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91-503

Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

Nº_____

In The

Supreme Court of the United States

October Term, 1991

PEPPER SCHULTZ,
Petitioner,

vs

FEDERAL COMMUNICATIONS COMMISSION, ***et al***
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pro Se:
Pepper Schultz
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May an applicant as an individual or corporate entity, amend a proceeding after an issue(s) is presented during Judicial Review, respecting the powers of the Constitution of the United States, Article III, Section 1, and Section 2, Clause 1?

May an agency or employee of the Federal Government, require an applicant for a prospective advertising business construction permit, by the use or threat of use of force, violence, intimidation, or duress, to coerce, compel or constrain or attempt to coerce, compel or constrain an applicant for a radio-broadcasting construction permit to employ or agree to employ, in connection with the conduct of the applicant's broadcasting business, any person or persons "in excess of the number of employees needed by such permit to perform actual services?" When the government requires a potential business person to have employees when he does not want or intend to, and being denied a construction permit under burdens of proof in Judicial Review, it violates the Constitution of the United States, Fifth Amendment, Due Process Clause, and Ninth Amendment.

May an individual or entity claim redress, to defray attorney costs for parties involved, and economic loss of money and livelihood, and for reasons of duress imposed on an applicant, incurred by unfair Judicial practice and procedures, perverse humor and regulation of Commerce, resulting from a government agency or employee, causing economic hardship, pursuant to the Constitution of the United States, First Amendment, and Fifth Amendment, Due Process Clause?

May a Judicial Review Board member of an agency of government, reverse an Administrative Law Judge's decision of the same agency for review, when a Review Board panel of three, in which one is not participating, one is dissenting the reversal, and one is reversing the decision? Is this not impeding justice, violating the Constitution of the United States, Fourteenth Amendment, Section 1?

May a private corporate entity, regulated by the State of Nevada provided by Article IV of the Constitution, prevail over a citizen of the United States in a Judicial comparative hearing regulating commerce, violating the Constitution of the United States, Fourteenth Amendment, Section 1?

May an individual or entity cause Judicial due process interference, by a physical letter of *ex parte* communication, to an Administrative Law Judge? This action results in usurpation of Judicial powers of the Constitution of the United States, Article III, Section 1, and Section 2.

May an agency or employee thereof, use public derision, to coerce a worthy applicant from a livelihood through regulating commerce by Judicial due process, and that government entity or employee be liable for such actions, for violating the Constitution of the United States, First Amendment, and Fourteenth Amendment, Section 1?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Pepper Schultz and respondents Federal Communications Commission, Comstock Broadcasters, Inc. (Principals Robert William Carroll and William Bennet Akert, *et al.*), and the respondents of the District Court of Appeals, District of Columbia.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEPPER SCHULTZ, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al*
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pepper Schultz *pro se*, pursuant to Supreme Court Rule 34.2, hereby requests earnestly that the Supreme Court grant this writ of certiorari to review the judgement of the court below.

OPINIONS BELOW

*

The Judgement of the Court of Appeals for the District of Columbia Circuit of case No. 90-1318 is reprinted in the Appendix hereto, p. 2a, *infra*.

The Order of the United States Court of Appeals for the District of Columbia Circuit of case No. 90-1318 is reprinted in the Appendix hereto, p. 1a, *infra*.

JURISDICTION

*

Invoking federal jurisdiction under Section 402 (b) of the Communications Act of 1934 (47 U.S.C. Section 402 (b)), and Rule 15 of the Federal Rules of Appellate Procedure, the petitioner brought this case from the Federal Communications Commission jurisdiction, to the United States Court of Appeals for the District of Columbia Circuit by

notice of appeal on June 22, 1990 (DATE DOCKETED June 25, 1990).

On petitioners appeal, the District of Columbia Circuit on March 21, 1991, filed a Judgement stating the appeal does not warrant a further opinion for reasons stated by the Commission in its Memorandum Opinion and Order released May 30, 1990 (Presented in Appendix, p. 2a, *infra*).

Invoking federal jurisdiction under Section 402 (b) (1) of the Communications Act (47 U.S.C. Section 402 (b) (1)), the petitioner submitted a brief titled On Appeal from Orders of the Federal Communications Commission, dated November 27, 1990 (Date of "Final Brief" February 15, 1991), the Court of Appeals for the District of Columbia Circuit issued an Order denying petition for rehearing, filed May 29, 1991 (Presented in Appendix, p. 1a, *infra*).

The jurisdiction of the United States Supreme Court to review the judgement of the Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Article III, Section 1, and Section 2, First Amendment, Fifth Amendment, Ninth Amendment, and Fourteenth Amendment, Section 1 are presented in the appendix, *infra*.

STATEMENT OF CASE

*

Petitioner *pro se*, began tendering for filing his application for a construction permit on May 3, 1982, with conscience of confidence in thought, knowledge and responsibility. The application was received by the Federal Communications Commission on May 19, 1982. A number of briefs were filed before (Presented in Appendix, pp. 180a-182a) the

Hearing Designation Order, Released: November 10, 1983 (Presented in Appendix, p. 3a), stating the issues for the proposed hearing, two of which prevailed for hearing:

a) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

b) To determine, in the light of the evidence adduced, which of the applications should be granted, if any.

The Petitioner then obtained legal representation. An Order naming the Administrative Law Judge (Presented in Appendix, p. 9a) to the proceedings and setting the hearing date of February 13, 1984, was released. Notice of Appearances were then submitted.

The hearing commenced on March 27, 1984, in Washington, D.C. (Volume II, presented in Appendix, p. 191a) where Pepper Schultz and Comstock Broadcasters, Inc. (Principal Robert W. Carroll) were present. The Initial Decision of Administrative Law Judge James F. Tierney was Released: July 30, 1984 (Presented in Appendix, p. 10a), granting application of Pepper Schultz and denying Comstock Broadcasting, Inc.

The Review Board hearing commenced on December 12, 1984, in Washington, D.C. (Volume III, presented in Appendix, p. 193a), where Pepper Schultz was present.

The Petitioner tried to amend the Review Board hearing, relating to information discussed at the Review Board hearing, immediately after. That amendment was rejected by the Review Board.

NOTE: Question Presented where violation may appear. May a private corporate entity, regulated by the State of Nevada provided by Article IV of the Constitution, prevail over a citizen of the United States in a Judicial comparative hearing regulating commerce, violating the Constitution of the United States, Fourteenth Amendment, Section 1?

A Memorandum Opinion and Order was Released: January 28, 1985 (Presented in Appendix, p. 28a), by the Review Board, remanding Pepper Schultz to the Administrative Law Judge on the following issues:

(1) To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and

(2) To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

> EXCERPTS from this MO & O:
>
> "It seems Schultz now concedes that his original proposal would shortly grind Pepper down with a workload not to be sneezed at." (n. 6)
>
> IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and proof under the issues added herein SHALL BE upon Pepper Schultz.

NOTE: Question Presented where violation may appear. May an agency or employee of the Federal Government, require an applicant for a prospective advertising business construction permit, by the use or threat of use of force, violence, intimidation, or duress, to coerce, compel or constrain or attempt to coerce, compel or constrain an applicant for a radio-broadcasting construction permit to employ or agree to employ, in connection with the conduct of the applicants broadcasting business, any person or persons "in excess of the number of employees needed by such permit to perform actual services?" When the government requires a potential business person to have employees when he does not want or intend to, and being denied a construction permit under burdens of proof in Judicial Review, it violates the Constitution of the United States, Fifth Amendment, Due Process Clause, and Ninth Amendment.

The Petitioner then presented a Motion for Leave to Amend, dated February 22, 1985, and an Amendment (Presented in Appendix, p. 183a, p. 187a), to the presiding Administrative Law Judge, which was accepted and unopposed by Comstock Broadcasters, Inc.

NOTE: Question Presented where it may appear. May an applicant as an individual or corporate entity, amend a proceeding after an issue(s) is presented during Judicial Review, respecting the powers of the Constitution of the United States, Article III, Section 1, and Section 2, Clause 1?

A hearing commenced on April 9, 1985, before the presiding Judge in Washington, D.C. (Volume V, Presented in Appendix, p. 201a), where only Pepper Schultz was present as a witness.

A Memorandum Opinion and Order was Released: April 12, 1985 (Presented in Appendix, p. 36a), by the Deputy Chief Administrative Law Judge, denying a Motion for Summary Decision and a Motion for Leave to File Supplement.

A Memorandum Opinion and Order was Released: May 7, 1985 (Presented in Appendix, p. 39a), by the Deputy Chief Administrative Law Judge, denying Comstock Broadcasters, Inc., Motion to Enlarge.

A Supplemental Initial Decision of Deputy Chief Administrative Law Judge James F. Tierney was Released: June 26, 1985 (Presented in Appendix, p. 43a). This Supplemental Initial Decision SHALL FIND IN FAVOR of Pepper Schultz application and denying Comstock Broadcasters, Inc.

An Order was Released: January 24, 1986 (Presented in Appendix, p. 56a), by Norman B. Blumenthal Member, Review Board, reversing the Deputy Chief Administrative Law Judge's decision and granting application of Comstock Broadcasters, Inc. The following Excerpts are in this Order:

> "[W]e all but ignore counsel's flummery suggesting that Schultz's insistence that he would utilize no 'employees' did not necessarily negate a reliance on friends and volunteers." (n. 5)
>
> "Schultz was either distantly out of touch with reality or singularly qualified for the laurel of 'FCC Fabulist of the Decade.'" (p. 5)
>
> "Schultz's February 22, 1985 amendment (George Washington's Birthday, no less) indicating funds on deposit of $101,000 contained no such qualification." (n. 9)
>
> "Raising additional doubt is the amazing fact that, despite the claims of a 'no strings attached' conveyance of $101,000, Schultz testified at subsequent hearing that he might not draw upon this windfall for financing the station, but might instead use it solely as 'collateral' for a cash bank loan. Tr. 237-239. Just why Schultz

might offer the bank his freefound $101,000 ready cash for a lesser cash loan is unexplained, but we are certain the hard-pressed banking industry would gladly rather receive tribute than pay it. We'd take the deal ourselves." (n. 9)

"[W]e have not previously encountered so threadbare an applicant as Schultz. . ." (p. 10).

"[S]ome of the fault[1] for the unnecessary prolongation of this case must be placed on the presiding ALJ, a decent man whose well-known patience and mercy were here taken advantage of by an applicant more to be pitied than pampered." (n. 10)

"Schultz has now apparently abandoned the uneducated illusion that ATS equipment was the panacea. It is not known whether Schultz completed his computer 'correspondence courses,' or whether he had merely advanced sufficiently to realize[2] that neither R2-D2 nor C3-PO was a 'stock' equipment item." (n. 13)

"Even now, Schultz urges that he be permitted a construction permit to operate with not much more in the way of resources than might be required for, say, a modest roadside fruitstand, and in an environment that would have daunted and depressed the desperate denizens of Devil's Island." (p. 12)

"We do not know if Schultz was (or is) serious about his proposals, is incurably deluded, or merely covets the permit in the hope of quick enrichment." (p. 13)

An Order was Released: March 9, 1987 (Presented in Appendix, p. 72a), by the Commission, denying Pepper Schultz' Review of a Review

---

[1] This appears to be a "personal attack" by Norman B. Blumenthal, directed to the presiding Administrative Law Judge.

[2] This appears to be a "personal attack" by Norman B. Blumenthal, on Pepper Schultz' competence.

Board Decision.

An Order was Released: June 29, 1987 (Presented in Appendix, p. 75a), by Associate General Counsel John I. Riffer, denying Pepper Schultz' Petition for Reconsideration and upholding a Review Board Decision granting Comstock Broadcasters, Inc. application for a new FM radio station at Sparks, Nevada.

A Memorandum Opinion and Order was Released: March 11, 1988 (Presented in Appendix, p. 78a), by the Commission, granting a Petition for Reconsideration and remanding Pepper Schultz to the Presiding Judge for further evidentiary hearings.

A Memorandum Opinion and Order was Released: May 4, 1988 (Presented in Appendix, p. 83a), by the Deputy Chief Administrative Law Judge, requiring a need for a further hearing to resolve the open question whether Pepper Schultz possesses the basic qualifications to construct and operate his proposed station at Sparks, Nevada.

An Order was Released: June 22, 1988 (Presented in Appendix, p. 89a), by the Deputy Chief Administrative Law Judge, granting an amendment of Comstock Broadcasters, Inc.(Principal Robert W. Carroll), advising of a change in the official mailing address of Comstock.

A Memorandum Opinion and Order was Released: June 28, 1988 (Presented in Appendix, p. 90a), by the Deputy Chief Administrative Law Judge, granting a Motion to Enlarge Issues by Pepper Schultz and further enlarged, to wit:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited ex parte presentation in this proceeding and, if so, under the evidence adduced, whether Comstock Broadcasters, Inc. is qualified to become a Commission licensee.

NOTE: Question Presented where violation may appear. May an individual or entity cause Judicial due process interference, by a physical letter of *ex parte* communication, to an Administrative Law Judge? This action results in usurpation of Judicial powers of the Constitution of the United States, Article III, Section 1, and Section 2?

An Order was Released: July 11, 1988 (Presented in Appendix, p. 97a), by the Deputy Chief Administrative Law Judge, granting a Joint Motion seeking receipt in evidence of the transcript of deposition of Pepper Schultz on May 17, 1988, and to be discussed at the further

prehearing conference.

A hearing commenced on November 15, 1988, before the presiding Judge in Washington, D.C. (Volume VIII, Presented in Appendix, p. 206a), where William B. Akert and Robert Carroll were witnesses and Pepper Schultz was present, only as an observer.

A Further Supplemental Initial Decision of Deputy Chief Administrative Law Judge James F. Tierney was Released: March 16, 1989 (Presented in Appendix, p. 99a), granting application of Pepper Schultz and denying application of Comstock Broadcasters, Inc.

An Order was Released: August 17, 1989 (Presented in Appendix, p. 133a), by Review Board Member Norman B. Blumenthal, reversing the presiding Administrative Law Judge's decision, granting application of Comstock Broadcasters, Inc. In this case the Review Board, normally a panel of three, consisted of only two members, one reversing and the other dissenting the reversal.

NOTE: 1) Questions Presented where violation may appear. May a Judicial Review Board member of an agency of government, reverse an Administrative Law Judge's decision of the same agency for review, when a Review Board panel of three, in which one is not participating, one is dissenting the reversal, and one is reversing the decision? Is this not impeding justice, violating the Constitution of the United States, Fourteenth Amendment, Section 1?

NOTE: 2) May an agency or employee thereof, use public derision, to coerce a worthy applicant from a livelihood through regulating commerce by Judicial due process, and that government entity or employee be liable for such actions, for violating the Constitution of the United States, First Amendment, and Fourteenth Amendment, Section 1?

NOTE: 3) Question Presented pertaining to redress may appear here. May an individual or entity claim redress, to defray attorney costs for parties involved, and economic loss of money and livelihood, and for reasons of duress imposed on an applicant, incurred by unfair Judicial practice and procedures, perverse humor and regulation of Commerce, resulting from a government agency or employee, causing economic hardship, pursuant to the Constitution of the United States, First Amendment, and Fifth Amendment, Due Process Clause?

A Memorandum Opinion and Order was Released: May 30, 1990

(Presented in Appendix, p. 172a), by the Commission, agreeing with the Review Board's resolution of the case, denying application of Pepper Schultz.

On March 18, 1991, Pepper Schultz was present at a hearing brought before the United States Court of Appeals for the District of Columbia Circuit, in Washington, D.C.

A Judgement was Filed: March 21, 1991 (Presented in Appendix, p. 2a), by the Circuit Judges, stating that the appeal does not warrant a further opinion.

Pepper Schultz, by counsel, petitioned the United States Court of Appeals for the District of Columbia Circuit for rehearing. The petition was denied by an Order Filed: May 29, 1991 (Presented in Appendix, p. 1a), from the Circuit Judges.

REASONS FOR GRANTING THE WRIT

*

Certiorari should be granted for the following reasons:

A. The possibility of rulings derived from this case regarding Judicial review and the acceptance of a curative amendment after the issues are determined. This is pertaining to procedures of due process for an applicant's business of a limited public resource nature.

B. A possible violation of the U.S. Constitution by a government agency, requiring an applicant for a construction permit to have employees, should be recognized in this case. Re: United States *v.* Petrillo, 332 U.S. 1 (1946), (Presented in Appendix p. 234a).

C. For possible rulings derived from this case regarding the function and powers of the Federal communication Commission imposed on broadcast applicants, resulting in economic injury through due process. Re: Federal Communications Commission *v.* Sanders Brothers Radio Station 309 U.S. 470 (1940), (Presented in Appendix p. 225a).

D. The possibility of redress for legal fees for both parties involved in this case and the possibility of reversal of a decision. Re: Peper *v.* Fordyce, 119 U.S. 469

(1886), (Presented in Appendix p. 221a).

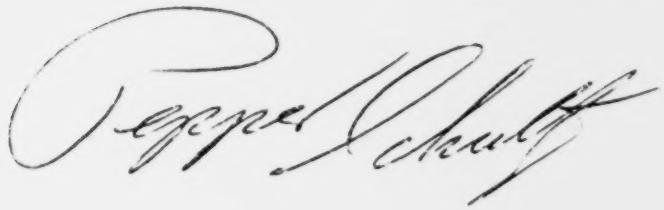
E. The Federal Communications Commission should be required to adhere to their own rules regarding *ex parte* communication.

CONCLUSION

*

The Federal Communications Commission acted in error by denying Pepper Schultz' application and accepting Comstock Broadcasters, Inc. application.

Respectfully submitted,[3]



Pepper Schultz *pro se*

Dated: August 23, 1991

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[3] Original Writ of Certiorari received for filing August 26, 1991 and an improper Writ was also received for filing September 6, 1991 by the Supreme Court Clerk and both were returned to petitioner pursuant to Supreme Court § 33.2 (4). This corrected substitute Writ for the original is being tendered for filing on September 25, 1991, in the U.S. mail for acceptance pursuant to § 33.7.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1318 September Term, 1990

Filed May 29, 1991
CONTANCE L. DUPRÉ
CLERK

Pepper Schultz,
v.
Federal Communications Commission,

Appellees

BEFORE: Wald, Ruth B. Ginsburg and Thomas, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed May 3, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRÉ, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

NOT TO BE PUBLISHED - SEE LOCAL RULE 14
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1318 September Term, 1990

FILED MAR 21, 1991
CONSTANCE L. DUPRÉ, Clerk

PEPPER SCHULTZ, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

COMSTOCK BROADCASTERS, INC., Intervenor

Appeal from the United States District Court
for the District of Columbia

Before: WALD, RUTH B. GINSBURG and THOMAS, Circuit Judges

JUDGMENT

This case was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. After full review of the issues presented, the court is satisfied that appropriate disposition of the appeal does not warrant a further opinion. See D.C. Cir. Rule 14 (c). Substantially for reasons stated by the Commission in its Memorandum Opinion and Order released May 30, 1990, it is

ORDERED and ADJUDGED that the orders from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15(b) (2).

Per Curiam
FOR THE COURT:
/s/ CONSTANCE L. DUPRÉ

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

MM-662

In re Application

RED ROCK BROADCASTING CORP. MM Docket No. 83-1205
(hereafter RRB) File No. BPH-820423AR
Sparks, Nevada
Req: 92.1 MHz, Channel 221A
3 kW (H&V), 440 feet

PEPPER SCHULTZ MM Docket No. 83-1206
(hereafter Schultz) File No. BPH-820519AK
Sparks, Nevada
Req: 92.1 MHz, Channel 221A
3 kW (H&V), -630 feet

COMSTOCK BROADCASTERS,INC. MM Docket No. 83-1207
(hereafter CBI) File No. BPH-820628AQ
Sparks, Nevada
Req: 92.1 MHz, Channel 221A
1 kW (H&V), 530 feet

For Construction Permit
for a New FM Station

-2-

HEARING DESIGNATION ORDER

Adopted: October 28, 1983 Released: November 10, 1983

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource

economy, portions of this Order had been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Inapplicable paragraphs omitted.

Late Filed
Amendments

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was filed after the "B" cut-off date, the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT(S)	DATE AMENDMENT(S) FILED
RRB	12/27/82

Areas &
Populations

13. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

ISSUES

Comparative

2. To determine which of the proposals would, on a comparative basis best serve the public interest.

Ultimate

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Late Filed
Amendments

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: RRB

28. IT IS FURTHER ORDERED,That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

29. IT IS FURTHER ORDERED,That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION
/s/ W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX(ES) [x] IS [ ] IS NOT ATTACHED.

APPENDIX

Additional Opinion Paragraphs

30. Schultz has filed a petition for leave to amend its application. The petition and the accompanying amendment were filed July 12, 1983; the last day for filing amendments as a matter of right was October 22, 1982.*/ Schultz states that the amendment was necessitated by a Federal Aviation Administration (FAA) determination, dated May 18, 1983, that the proposed antenna would "cause brute force interference to the Instrument Landing System at Reno-Cannon International Airport." CBI and RRB both have filed an opposition to petition for leave to amend the Schultz petition. CBI states that the Schultz amendment constitutes a major change within the meaning of Section 73.3573(a)(1) of the Commission's Rules, thus requiring the application to receive a new file number, and be returned to the processing line without cut-off protection. Additionally, CBI states that good cause has not been proffered by Schultz for the acceptance of his amendment. RRB opposes Schultz's petition as being late and states that Schultz failed to "take steps to correct what he knew or should have known to be an unacceptable proposal." RRB also notes the grounds of opposition of CBI regarding the amendment as being major, and concurs with CBI's proposed method for handling the application.

31. Review of the amendment shows that it is a major amendment pursuant to Section 73.3573(a)(1) of the Commission's Rules. Section 73.3573(b) of the Rules requires the application to receive a new file number, and consequently, be assigned a new cut-off date, thereby preventing the application from receiving comparative consideration with the other applications on file. We note that the amendment was in response to an adverse FAA determination, and not of Schultz's own personal volition. Therefore, good cause exists for the filing of the amendment. It appears that Schultz was first informed of his proposal's

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*/ The Commission initially returned the petition and the opposition's thereto, but on its own motion reconsidered its action, and has addressed the pleadings in the body of this Order.

adverse effects to air navigation by the FAA letter dated May 18, 1983. Prior to that time, Schultz had no way of knowing the adverse effects of his proposed tower, and RRB does not provide any facts that Schultz was actually aware of such. Schultz acquired a new site and filed a new amendment on July 12, 1983, which in light of the circumstances appears to be timely.

32. Accordingly, since the petition and the ensuing amendment relocating the tower were filed in response to an adverse FAA determination, we will waive Section 73.3573 as it relates to the cut-off rules and accept the amendment for filing. However, Schultz may not profit comparatively from his new proposal, for an applicant may not improve its comparative position after the time for amendments as a matter of right has passed. Therefore, any comparative advantage resulting from the amendment by Schultz will be disallowed.

33. Schultz has filed two petitions to deny, and motion to dismiss the application of RRB dated June 21, 1982, September 1, 1983 and September 12, 1983, respectively. Schultz also has filed a petition to deny and a motion to dismiss the application of CBI dated August 27, 1983 and September 9, 1983 respectively. However, Schultz's petitions and motions are essentially petitions to specify issues. Since the Commission's Report and Order in re Revised procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these pleadings have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229 of the Commission's Rules.

34. RRB has petitioned for leave to amend its application. See Paragraph 12, above. The accompanying amendments were filed December 27, 1982; the last day for filing amendments as a matter of right (the "B" cut-off date) was October 22, 1982. The applicant's amendments report: an increase in the corporate president's percentage of stock from 20% to 46.7%; a reduction in the corporate vice president's percentage of stock from 40% to 26.7%; the departure of one shareholder; an increase in its effective radiated power from 1.2 kW to 1.350 kW; and a proposal to maintain auxiliary power at its studio and transmitter site. RRB states that the amendments report events to

the Commission that were in existence prior to the "B" cut-off date. However, RRB amended its application more than two months after the "B" cut-off date.

35. Applicants are required, pursuant to Section 1.65 of the Commission's Rules, to keep their respective applications substantially accurate and complete in all significant respects. The section requires the filing of such amendments to be as prompt as possible, but in no event more than 30 days after the occurrence of such event(s), unless good cause is shown. If the matters contained in the amendments occurred prior to the "B" cut-off date, then pursuant to Section 1.65 of the rules, RRB should have filed the amendments promptly, within 30 days, not more than two months later. RRB does not provide a showing of good cause as to why the amendments could not have been filed promptly as required by Section 1.65 of the rules. Accordingly, an issue will be specified.

Additional Issue Paragraphs

1. To determine whether RRB has failed to comply with the provisions of Section 1.65 of the Commission's Rules, with respect to keeping the Commission advised of ownership and engineering changes to its application, and if so, the affect of such noncompliance on the applicant's comparative qualifications.

Additional Ordering Paragraphs

36. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Schultz IS GRANTED, and the corresponding amendment IS ACCEPTED to the extend indicated herein.

37. IT IS FURTHER ORDERED, That oppositions to petition for leave to amend filed by RRB and CBI ARE DENIED.

38. IT IS FURTHER ORDERED, That the petition to deny the RRB application filed by Schultz IS HEREBY DENIED.

FCC 83M-4255

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

ORDER

Issued: November 17, 1983 ; Released: November 18, 1983

IT IS ORDERED, That Administrative Law Judge James F. Tierney shall serve as Presiding Judge in the above-entitled proceeding; that the hearing therein shall be convened on February 13, 1984, at 10:00 a.m., and the prehearing conference shall be held on January 12, 1984, commencing at 9:00 a.m.; and,

IT IS FURTHER ORDERED, That all proceedings shall take place in the Offices of the Commission, Washington, D.C.

All parties are put on notice that they are expected to be fully cognizant of Part I of the Commission's Rules and Regulations concerning Practice and Procedure.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Lenore G. Ehrig
Chief Administrative Law Judge

FCC 84D-49

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ
Sparks, Nevada

MM DOCKET NO. 83-1206
File No. BPH-820519AK

COMSTOCK BROADCASTERS,INC.
Sparks, Nevada

MM DOCKET NO. 83-1207
File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert D. Miller, Jr., Esq. (Koteen and Naftalin) on behalf of Pepper Schultz; David M. Hunsaker and Denise B. Moline, Esqs. (Putbrese and Hunsaker) on behalf of Comstock Broadcasters, Inc.; and Norman Goldstein, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: July 23, 1984 ; Released: July 30,1984

Preliminary Statement

1. Originally, this proceeding involved three mutually exclusive applicants. By Memorandum Opinion and Order, FCC 84M-1615, released April 3, 1984, Red Rock Broadcasting Corp.'s application, following approval of a Settlement Agreement with Pepper Schultz, was dismissed, with prejudice.

2. By Hearing Designation Order, MM-662, released November 10, 1983, the Chief, Mass Media Bureau under delegated authority designated the mutually exclusive applications of Red Rock Broadcasting

Corp. (since dismissed, supra.); Pepper Schultz (Schultz) and Comstock Broadcasters, Inc. (Comstock) for authority to construct a new FM station in Sparks, Nevada for hearing on the following issues:

> a) To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> b) To determine, in the light of evidence adduced, which of the applications should be granted, if any.

3. With the surviving applicants Schultz and Comstock, a hearing was held in Washington, D.C. on March 27, 1984 and the record of the proceeding was closed on that date. Timely proposed findings of fact and conclusions of law as well as reply findings were filed by Schultz and Comstock on June 4, 1984 and June 18, 1984, respectively.

4. For the reasons set forth hereinafter this, as an Initial Decision, SHALL GRANT the application of Pepper Schultz.

Findings of Fact

A. Schultz:

5. Mr. Schultz is an individual applicant. He proposes to be the full-time general manager of his proposed station and to devote at least forty hours per week to those duties (Schultz Exhibit No. 1).

6. Mr. Schultz has lived in Sparks, Nevada since 1942, with the exception of the period 1960-1970, when he resided in Reno, Nevada. He owns no interest in any medium of mass communication (Schultz Exhibit No. 1), and is presently employed by the United States Government as an electronics technician with the Department of the Interior, Bureau of Land Management (Tr. 32). In that position, Mr. Schultz installs and maintains two-way radio equipment (Tr. 34). He will resign that employment in order to work at his proposed station (Schultz Exhibit No. 1).

7. Mr. Schultz's prior broadcast experience is as listed below:

Station	Position	Dates
KONE(AM), Reno	Disc Jockey - announcer	1965

KTVN-TV, Reno	Switcher - 1st class operator	1968
KCRL(AM), Reno	Account Executive	1972-74
KOLO-TV, Reno	Transmitter Engineer	1974-76

The first two position were part-time and Mr. Schultz held them for less than one year. The last two positions were full-time, and Mr. Schultz held each for the periods indicated (Schultz Exhibit No. 1). As an account executive with KCRL, Mr. Schultz's duties included supervising production personnel in the preparation of commercials for his accounts, and he occasionally represented the station at meetings of civic organization (Tr. 38-40). Mr. Schultz also worked as an account executive for Donrey Outdoor Advertising for a period of time between 1976 and 1978 (Tr. 41-42). He holds a first-class radio operator's license (Tr. 45).

8. Mr. Schultz proposed to equip his proposed station with auxiliary power facilities to permit the transmitter and necessary studio facilities to operate during commercial power failures (Schultz Exhibit No. 1).

B. Comstock:

9. Comstock Broadcasters, Inc. is a Nevada common stock corporation, with the following ownership and management structure:

Robert W. Carroll, President, Director and 51% shareholder, with 100% Voting Rights
William B. Akert, Director and 49% Beneficial Owner
Marva D. Carroll, Secretary

(Comstock Exhibit 1, p. 1). Through a Voting Trust Agreement executed October 18, 1982, William B. Akert assigned his 49% ownership interest in Comstock to be held in Trust by Mr. Carroll. Pursuant to the Agreement, Mr. Carroll is empowered to vote Mr. Akert's interest at all meetings of Comstock on any resolution, matter, or business submitted at any such meeting (Comstock Exhibit 1, pp. 1; 4). The Trust may not be revoked by the Grantor earlier than the first renewal filing date for the Comstock station subsequent to the issuance

of a construction permit (Comstock Exhibit 1, p. 3). Under the Voting Trust Agreement, Mr. Akert has left the complete control of the station to Mr. Carroll (Tr. 87-88).

10. Mr. Akert was not a stockholder in Comstock at the time the corporation was formed. At that time, two other parties and Mr. Carroll were the original subscribed stockholders (Tr. 71). The two other stockholders, partners of Mr. Carroll in another business venture, subsequently decided they did not wish to become involved in an application for a radio station, and at that point, Mr. Carroll contacted Mr. Akert, whom he has known for approximately six years, and asked him to join with Carroll in filing the application (Tr. 71, 73-74; 76-77).

11. While acknowledging that one of the objectives of the Voting Trust Agreement was to enhance Comstock's comparative position in the proceeding (Tr. 68; 74), Carroll stated that a primary objective was the importance of having one person in complete control of the station and answerable to the FCC (Tr. 66-68). Since Carroll had previous broadcast experience, it was logical that he should be the one in control (Tr. 68).

12. While Mr. Akert is nominally a director of the corporation (Comstock Exhibit 1, p. 1; Tr. 69), he has, by the Voting Trust Agreement, left complete control of the station to Carroll (Tr. 87-88). As a beneficial shareholder and director, Mr. Akert's role would be limited to attending a combined annual meeting of the stockholders and directors for purposes of review (Tr. 69, 86-87). The nature of such a meeting might take the form of a luncheon with Mr. Akert, wherein Mr. Carroll would provide Akert with a general review of the radio station with regard to programming, serving the needs of the community of license, personnel, and profit and loss (Tr. 86-87). Unless votes are required to be taken and recorded pursuant to the terms of the Articles of Incorporation or By-Laws of Comstock, there would be no votes taken at the annual lunch meeting (Tr. 88-89). Mr. Akert would not have a vote, but would simply be in the position of a non-voting stockholder receiving information about the financial status of his company (Tr. 90). As stated by Mr. Carroll, Mr. Akert's role at the lunch meeting will be quite limited: "Mr. Akert will either receive a bonus or come up with his checkbook at that meeting" (Tr. 87).

Robert W. Carroll

13. Robert W. Carroll was born February 6, 1937 in Chicago, Illinois. He attended area schools, and later moved to California, where he attended Los Angeles City College, majoring in broadcasting. While attending college, Mr. Carroll worked part-time as a production assistant at KTLA-TV (Channel 5), Los Angeles (Comstock Exhibit 4, p. 1).

14. In 1956, Mr. Carroll took a position as a staff radio announcer at KSUE(AM), Susanville, California. His duties included other phases of broadcast operations, including sales, engineering, logs, programming, billing procedures, management, sports announcing (including play-by-play) and news (Id.).

15. In 1958, Mr. Carroll moved to Reno, where he took a job as disc jockey and News Director with KDOT(AM). After one year in that position, he was appointed Television News Director for KOLO-TV in Reno. From 1959 through 1967 he was the primary news anchorman for the station with duties that included gathering and writing the news, field interviews, shooting and editing film and working as a play-by-play sports announcer for KOLO radio on many remote sports events. Mr. Carroll was also appointed News Director for KOLO(AM), from 1962 to 1967. During this time, Mr. Carroll also wrote and produced a number of television and radio documentaries for KOLO(AM) and TV (Id.).

16. In 1967, Mr. Carroll joined Reno's new television station KTVN-TV as News and Special Events Director. From 1967 through 1970 he ran the station's news department, was the anchorman on the evening news, wrote and produced a number of documentary shows, and was the play-by-play announcer for University of Nevada football, basketball, and baseball games. He also functioned as the station's Operations Director for the period of one year. During this time, Mr. Carroll was honored by several organizations (including the Reno/Sparks chapter of the NAACP) for out standing reporting coverage of civil rights activities in the State of Nevada. Mr. Carroll also hosted a morning radio show on KCBN(AM) during the same period (Id., pp. 1-2).

17. From 1970 through 1981, Mr. Carroll, a licensed pilot, produced

an irregular basis, throughout that period (Comstock Exhibit 4, p. 2).

18. For the past fifteen years, Mr. Carroll has been a frequent guest lecturer at the University of Nevada, Reno, speaking on the subjects of broadcasting, advertising and public relations. For the past three years, Mr. Carroll has taught a weekly class in the field of advertising and public relations at Truckee Meadows Community College (Id.).

19. Currently, Mr. Carroll is President and 40% shareholder in Media Consultants, Inc., a Reno advertising and public relations firm (Comstock Exhibit 4, p. 2; Tr. 78-79). Media Consultants designs and produces advertising, buys time on media, conducts publicity and advertising research on behalf of clients - "people who have something that they want to sell and want to advertise it" (Tr. 78-79). Media Consultants places ads on radio, television, billboards, newspapers, and other media (Tr. 79). In the event Comstock is awarded the construction permit, Mr. Carroll intends to sever his relationship with Media Consultants entirely. He would resign as officer and director, and have the company buy out his 40% ownership interest (Tr. 81; Comstock Exhibit 3, p. 1). Carroll has discussed the matter of his disassociation from Media Consultants with his partner, and assumes that his partner will take over Carroll's present duties with the company (Tr. 80-81). Upon his withdrawal as an officer, director and stockholder, Mr. Carroll would no longer participate in any decision-making process or business affairs of Media Consultants, Inc. (Tr. 80, 83).

20. Mr. Carroll has contributed in excess of 51% of the funds spent thus far in filing and prosecuting the Comstock application, and intends to contribute 51% of the funds necessary to build and operate the station (Tr. 83-84).

Diversification (Comstock)

21. William B. Akert is the owner of 160 shares (approximately 0.0001999%), of Gannett Co., Inc., which holds interests in a number of broadcast stations and newspapers. Gannett Co., is a publicly held company with more than fifty shareholders (Comstock Exhibit 2, p. 1). Gannett owns the Nevada State Gazette-Journal, which serves Reno, Nevada (Tr. 77-78). While the Gazette-Journal is the only daily newspaper in the area, there are several weekly newspapers (Tr. 78).

Nevada (Tr. 77-78). While the Gazette-Journal is the only daily newspaper in the area, there are several weekly newspapers (Tr. 78).

22. Apart from Mr. Akert's nominal interest in Gannett Co., Inc., neither Comstock nor any of its principals hold any ownership or management interest in any broadcast station, MDS facility, STV station, CATV system, newspaper, publishing house, or other medium of mass communication (Comstock Exhibit 2, p. 1).

Integration of Ownership With Management (Comstock)

23. In the event Comstock is awarded the construction permit in this proceeding, Robert W. Carroll, a holder of 100% of the voting stock of Carroll, will become the full-time General Manager of the proposed station (Comstock Exhibit 3, p. 1). Mr. Carroll intends to devote in excess of 40 hours per week to these duties (Id.). As General Manager, Mr. Carroll will supervise the construction and start-up of the station, and thereafter supervise and oversee all station functions (Id.).

24. As noted above, Mr. Carroll intends to sever all connections with his present business, Media Consultants, Inc., in order to ensure that his responsibilities toward the proposed station are effectively met (Tr. 80-81; 83; Comstock Exhibit 3, p. 1). Because of a long relationship with two clients of the firm, however, Mr. Carroll stated that he might continue to be a "commercial spokesperson" for them on a freelance basis (Tr. 80, 82), not related to the business affairs of Media Consultants, Inc. (Id.). Carroll indicated that this was not an unusual practice for media personalities in an area of the size of Reno (Id.). While Mr. Carroll would be calling on accounts in the area as part of his duties as General Manager, this would be solely on behalf of the new station, and not connected in any way to media Consultants, Inc. (Tr. 80, 83).

Local Residence and Civic Activities

25. Robert W. Carroll resides in Reno, Nevada, which is within the 1 mV/m contour of Comstock's proposed station. Mr. Carroll has been a resident of Reno since 1958 (Comstock Exhibit 3, p. 1).

26. Mr. Carroll is, and has been involved in local civic affairs in the Reno-Sparks area. He is past President and current member of the

President of the Washoe County Library Board of Trustees (whose jurisdiction includes the Sparks library), as board member of the United Way, Salvation Army and Nevada Civil Defense Advisory Board, as past President of the Reno Kiwanis, and as past Lt. Governor of the Kiwanis Division 23 (northern Nevada, including Reno and Sparks, and Susanville, California) (Comstock Exhibit 3, pp. 1-12).

Previous Broadcast Experience

27. Mr. Carroll has held the following positions at the broadcast stations indicated:

Dates [1]	Station/Location	Position
1954-55	KTLA-TV Los Angeles, CA	Part-Time employee Production Department
1956-58	KSUE(AM) Susanville, CA	Staff Radio Announcer
1958-59	KDOT(AM) Reno, NV	Disc Jockey and News Director
1959-67	KOLO-TV Reno, NV	TV News Director - Anchorman reporter, sportscaster, Operations Director
1962-66	KOLO(AM) Reno, NV	News Director
1967-70	KTVN-TV Reno, NV	News & Special Events Director; documentaries, sportscasting Operations Director
1967-70	KCBN(AM) Reno, NV	Announcer, Morning Radio Show (simultaneous with work at KTVN-TV)

[1] Dates are approximate and constitute the best recollection of the witness (Comstock Exhibit 3, p. 2).

1967-70	KCBN(AM) Reno, NV	Announcer, Morning Radio Show (simultaneous with work at KTVN-TV)
1970-81	KOLO(AM) Reno, NV	Program Producer, production and airing of "Skywatch" - traffic report

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Auxiliary Power (Comstock)

28. Comstock proposed to acquire and maintain auxiliary power facilities sufficient to provide emergency power for both the transmitter and the studio, so that its proposed station may remain operational during a power blackout or other emergency situation (Comstock Exhibit 5, p. 1).

ULTIMATE FINDINGS AND CONCLUSIONS

Diversification

1. Neither Schultz nor Comstock, nor Comstock's principals hold any cognizable interests in other media of mass communications that would warrant the imposition of a significant demerit to one applicant or a preference to the other.

2. Comstock's William B. Akert, is 49% beneficial owner, holds 160 shares (approximately 0.0001999%) of Gannett Co., Inc. which holds interests in a number of broadcast stations and newspapers. Nominal interests are de minimis and are of little consequence in comparative evaluation between competing applicants for broadcast facilities. Cannon's Point Broadcasting Co.,53 RR 2d 953, 958 (1983), among others. Since Mr. Akert is a non-voting stockholder of Comstock, and plans not to be involved in any way in the policy-making or programming of the station, his nominal interest in Gannett, a publicly held company, has no comparative significance. Nor does the fact that Gannett publishes a local daily newspaper in Reno, Nevada, elevate Mr. Akert's interest into a significant role.

3. Also Mr. Carroll's current ownership and management interest in Media Consultants, Inc., an advertising and public relations firm, no

Television Corp., 43 RR 2d 857 (Rev. Bd. 1978); Golden State Broadcasting Corp., 54 RR 2d 348 (Rev. Bd. 1983). In any event, the record reflects that Mr. Carroll will divest himself of his entire interest in the company.

4. Mr. Schultz holds no ownership interest in a medium of mass communication. Schultz intends to proceed with construction immediately upon a grant, and would, in any event, have construction completed within three years time.

Best Practicable Service - Integration of Ownership With Management

The Schultz Proposal

5. Pepper Schultz has proposed to be the full-time General manager of his proposed station. As an individual applicant, he would be entitled to 100% quantitative integration.

6. Schultz for an indefinite initial period, would be the sole employee and operator of the station: he would do all of the announcing, sell all of the commercials, do all of the engineering, billing, etc. until such time as the station had a cash flow sufficient to hire personnel. He stated he has given no thought to what personnel he might hire at that time. Comstock would have it that a significant and legitimate question is raised about the efficacy of Mr. Schultz's integration pledge. Despite the fact that the station would be operating 24 hours a day, Comstock says, Schultz claimed no other operator besides himself was needed. He acknowledged, that Commission Rules require station identification every hour, which he would be obliged to perform. Yet, continues Comstock, at the same time, "he would be out in the street 20 hours a week calling on potential accounts." Schultz should also recognize that the Commission requires an operator on duty at all times, adds Comstock. His plans to operate the station, while "perhaps admirable", Comstock notes, appear impossible of effectuation. Because Schultz's speculations of hiring additional personnel at a later time when the cash flow comes in are based on the initial efficacy of his one-man operation, Comstock suggests that the Schultz proposal "is factually defective" for both the short and the long term. When promises, on their face cannot be carried out, an award of integration credit cannot be justified, Comstock argues.

both the short and the long term. When promises, on their face cannot be carried out, an award of integration credit cannot be justified, Comstock argues.

7. Even if Mr. Schultz's "Herculean expectations could somehow be fulfilled," Comstock urges, it is clear that many of the duties that he would be performing would not be management functions; e.g., non-managerial functions, such as announcing, routine maintenance and technical functions, and/or clerical duties. Citing High Sierra Broadcasting, Inc., 55 RR 2d 627 (Rev. Bd. 1983); Bradley, Hand and Triplett, 51 RR 2d 383 (Rev. Bd. 1982); Grand Broadcasting Co., 2 RR 2d 327 (1964).

8. Yet, Mr. Schultz, an individual applicant, proposed to be the full-time General Manager of his station. His past activities respecting earlier an unconstructed station is not, as Comstock would have it, a comparative imperfection or blemish and, without more, he is clearly entitled to credit for one hundred percent full-time integration.

9. Mr. Carroll, who owns 51% of Comstock beneficially and an additional 49% as trustee under a voting trust, also proposed to be the full-time General Manager of Comstock's station.

10. It seems clear and admitted that the principal reason for the Comstock voting trust arrangement is to confer legal title to one hundred percent of Comstock's stock on Mr. Carroll so that Comstock can claim credit for 100% full-time integration in this proceeding. In the absence of that voting trust, Comstock could claim only the 51% integration credit to which it is entitled by virtue of Mr. Carroll's legal and beneficial ownership of 51% of Comstock's stock.

11. Schultz argues that in Anax Broadcasting, Inc., 87 FCC 2d 483, 49 RR 2d 1589 (1981), it was observed that where limited partners "have no authority to participate in the management of an applicant, are required to maintain a purely passive role," and "are passive investors and have no authority to control the licensee, their integration or lack of integration is inconsequential" (49 RR 2d at 1594). In these circumstances, Schultz notes, only the integration of the general partners is considered and, in an extreme example, a sole general partner having 1% equity position but proposing to work full-time as the general manager of a limited partnership's proposed radio station, would be able

participation of the holders of its voting stock, and the proposed participation of its non-voting, purely passive investors, preferred stockholders is not considered, see Bradley, Hand and Triplett, 89 FCC 2d 657 (Rev. Bd. 1982).

12. These cases, however, are not dispositive of the present question. First, under Commission policy and precedent extant, limited partners are merely passive investors, with no say in the manner in which the partnership is run. The same is generally true of holders of non-voting preferred stock. Mr. Akert, however, is not merely a passive investor. He is also one of Comstock's three directors, and has all of the rights and obligations incident to that position, regardless of where he can "vote" his stock.[2] Schultz relates:

> "In the exercise of their duty of management, the directors, usually as a board, are required to use their best judgement and independent discretion, and are responsible for the determination and execution of corporate policy. Their management functions usually include: (a) policy decisions with respect to products, services, prices, wages, labor relations, (b) selection, supervision, and removal of officers and possibly other executive personnel, (c) fixing of executive compensation, pension, retirement, etc., plans (d) determination of dividends, financing and capital changes; (e) delegation of authority for administrative and possibly other action, (f) possible adoption, amendment, and repeal of by-laws, (g) possible participation, along with shareholders, in approving various extraordinary corporate matters, and (h) supervision and vigilance for the welfare of the whole enterprise" (Handbook of the Law of Corporation, Henn, 1961, p. 338 (footnotes omitted)).

As a director of Comstock, Akert would therefore have duties and rights of a substantial nature, which takes him out of the "passive

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[2] Mr. Carroll could think of no circumstances in which he would vote Mr. Akert out as a director.

As a director of Comstock, Akert would therefore have duties and rights of a substantial nature, which takes him out of the "passive investor" category.[3]

13. Second, Schultz asserts, limited partnerships are recognized investment vehicles and have valid commercial purposes; that the same is true of the various classes of common and preferred stock. But is not true of the present arrangement. As Mr. Carroll stated, there is no way in which the existence of the trust will impact upon either the day-to-day operation of the proposed station or the adoption of policies governing that day-to-day operation. Mr. Carroll will have no more "say" in the operation of the station than he would in the absence of the trust agreement. And the trust beneficiary, Mr. Akert, will have no less say in those matters.

14. Schultz states that the answer to the question posed by the voting trust agreement must, therefore, be searched for in the light of the purpose stated by the Commission for placing great significance upon integration of ownership and management:

> "We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve those needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense integrated ownership." Policy Statement on Comparative Broadcast Hearings, 5 RR 2d 1901 (1965) (Emphasis added in the original).

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[3] The Initial Decision in Bradley, Hand and Triplett, supra., specifically noted that "None of the preferred stockholders is an officer or director of OCR" (89 FCC 2d at 682).

Akert's stock to Mr. Carroll did not produce a closer association of legal responsibility and day-to-day performance. Mr. Carroll already had the power to control the affairs of the corporation, by virtue of his 51% stock interest; Akert, in his capacity as a 49% stockholder, had no power to prevent Mr. Carroll from doing so. By virtue of the trust arrangement, however, Carroll will have a fiduciary responsibility to Akert which he would not otherwise have. That fiduciary obligation may well require him to be, at least, somewhat more attentive to Mr. Akert's interests than he would have to be in the absence of the trust.

16. Since Akert retained full powers as a director of Comstock, he will still be able to exert substantial influence over Comstock, and will have substantial legal responsibility for its conduct, even though he will not participate in its day-to-day operations, Schultz adds.

17. Schultz suggests that the particular trust relationship between Carroll and Akert may have detrimental attributes as far as being able to fully respond to the needs of the community here. Schultz speculates that, for example, if Mr. Carroll must decide whether Comstock should spend corporate profits on public service programming instead of declaring a dividend, it would appear that his fiduciary obligations to Mr. Akert would require him to "vote" Mr. Akert's stock in favor of the declaration of the dividend, since that would be the course most beneficial to Mr. Akert's private interests. Scott on Trusts, third edition, Section 193.1 (1967). Schultz contends, the least Mr. Carroll would have a difficult choice to make and there is no way on the present record to determine which choice he would make. And, of course, Mr. Akert, as one of Comstock's directors, would continue to have a substantial influence over the making of such decisions.

18. Without doubt, the craftsmanship or design by Comstock of the trust instrument, otherwise permissible if not somewhat resourceful, seeks to fashion the best possible integration posture vis a vis its opponent. Yet, as Schultz argues, quite well and convincingly, the shadow of the trust and its traditional duties is immanent and while perhaps not the "artificial procedural gimmick" Schultz describes, it cannot, in reason, achieve its flawed purpose and, thus, for reasons stated in greater detail, infra, it may be concluded that Comstock can be credited only with full-time integration of its 51% stockholder.

Integration as Enhanced By Local Residence

19. While both Mr. Carroll and Mr. Schultz are residents of the Sparks area, Mr. Carroll resides and apparently will continue to reside in Reno. Only Mr. Schultz resides in Sparks, of which he has been a resident for more than thirty of his forty two years. Both applicants are entitled to enhancement by virtue of local residence. The slight differences of Sparks versus Reno is hardly of significance.

20. Since the record is silent as to any civic activities of Mr. Schultz, Schultz is entitled to no enhancement on that basis.

21. Prior broadcast experience is the least significant of the factors enhancing integration credit, because, if given greater significance, it might very well discourage and dissuade the entry of newcomers in the enterprise of broadcasting. Yet, however, disparaged as of little moment by Schultz, Comstock's Carroll's considerable broadcast experience be it part-time or other, far exceeds that of Schultz, is a plus factor and would entitle Comstock, on any measure, to a moderate preference over Schultz.

22. Though Schultz would denigrate Comstock's Carroll civic activities as being in the "distant past," hence of little value, Comstock characterized this argument as "nonsense." The evidence would support Comstock's position and Comstock would be entitled and is credited with a moderate preference over Mr. Schultz. Walter Broadcasting Corp., 52 RR 2d 1063 (1982). Likewise,as noted above, respecting broadcast experience, Comstock terms Schultz's suggestion of very little difference between two applicants as "nothing short of an insult." While it does not have that harsh ring, it is mistaken and the some thirty years of Carroll's broadcast experience, be it part-time or other is clearly creditable and a positive or clear preference can be assigned to Comstock in this qualitative category. Also, little distinction can be attributed in the matter of local residence of the parties. Both reside in the proposed service area; indeed Sparks (Schultz) and Reno (Comstock) are contiguous communities. See Minority Broadcasters or East St. Louis, Inc., FCC 84R-45, released June 5, 1984.

23. Diversification attributes between the applicants, likewise are virtually equal, Schultz would not deserve the modest preference he seeks simply because the Gannett interests of Comstock being of

inscrutable dimension to assess its effect - less than 2/10,000th of one percent of Gannett Co., - would be tantamount to setting forth precision to the extreme outer limits if pi (π) 3.14159265+, the + being mathematically infinite. In a word, such an extremely small interest could have no appreciable effect on what the comparative process respecting diversification seeks. Again, on this score the parties stand equal.

24. The critical and dispositive question of comparative choice here appears to rest on the full appraisal of the parties' claims to 100% integration of ownership with management. There is no obstacle or impediment in the evidence which would undermine Schultz' claim of 100% integration, albeit Comstock would have it that the proposed one-man operation by Schultz of the many duties affecting a business of an FM station is an impossible feat; hence, Schultz's proposal on integration must be greatly diminished. Without doubt, as he concedes, he "will be very busy during the first month or two of station operation" but that the necessary functions are not beyond his capabilities. The evidence would support that Schultz even "after the perhaps somewhat hectic months" will be able to perform as expected and required. Thus, as to Schultz, a 100% integration can be and is credited.

25. Respecting Comstock's claim for 100% integration, the question is not that simple to resolve. A full appraisal must be made of the trust agreement whereby the 49% stockholder Akert has placed that interest in trust with Carroll, the 51% owner. Comstock argues in its Reply "there is nothing unfair, prejudicial or gimmicky about a legal instrument enabling Comstock to obtain the comparative benefit it deserves" (emphasis in original). And though it may be the case that the ownership attribution rules need "some overhauling," as Comstock suggests, nevertheless by devising the trust instrument Comstock may have perhaps unwittingly created its own monster.

26. Why? Even though the trust instrument may have attributes of a "legal fiction," as Schultz urges - legal fictions abound in our system of jurisprudence, which have proven historically convenient and at times, necessary - a private corporation is a fictionalized person for a simple example - under the trust, a trustee such as Comstock's Carroll, by virtue of that office is infused with much more than the bare legal title of the corpus of the trust - 49% voting rights - the trustee is also charged with the very high duty in a fiduciary relationship with the

trust's beneficiary. All acts of the trustee must redound to and be reflective of the best interests of the beneficiary. Thus, while the law may recognize that "legal title" rests in the trustee, that fact does not strip the beneficiary of all recourse should impairment, potential or real, be visited upon the trust and its objects by the acts of the trustee.

27. Hence, the shadow of the immanence of the beneficiary casts fettered, not infettered, restraints upon the trustee here, Carroll; such would not be the case where Carroll's stock ownership of the 49% unqualified. And this condition is a far different situation or circumstance of voting and non-voting stock in a private corporation of the rights of a partnership comprised of general and limited partners, both well established and well recognized legal concepts. Here, besides the beneficiary remaining a Director of the corporation, as pointed out by Schultz, there persists a trustee/beneficiary relationship between two fully emancipated, presumably compos mentis persons who additionally appear to be both close social as well as business friends. These conditions, to this mind, fatally affects the true ownership of the trust stock by Carroll and whatever the supposed imperfections of the ownership attribution rules, footnoted by Comstock, in the sometime Never Never Land of comparative choice and absent those well recognized legal conditions of tenancy-by-the entirety or joint tenency and the like, 100% ownership attribution in integration of management with ownership must be equated with flawless, unqualified ownership - which is not the case here.

28. Trust instruments are, of course, greatly different than proxy instruments where the stock owner retains ownership but, from time to time, gives to another party authority or power to vote as he or she sees fit; in a trust, the cestui que trust, or beneficiary's interest is paramount, not that of the trustee; and surely trustee instruments are not in the legal category of lenders of capital, private or public, who may require collateral conditions or directorships as prerequisites of lending; such parties, presumably, consider their interests paramount but they are neither trustees nor owners; at best, lien holders.

29. Having noted this and finding the arguments of Schultz respecting the trust arrangement fully persuasive, Comstock cannot be given the 100% integration credit it seeks; rather and compellingly Comstock's claim of full-time management/ownership posture must be rejected and it is concluded to be 51% and nothing more.

30. On the other qualitative aspects of integration e.g. local residence, prior broadcast experience, civic activities etc., the difference between the parties, while cognizable in favor of Comstock, on grounds of broadcast experience and civic activities, they are not dispositive of the choice to be made. This contest must be decided on the integration posture of the parties and, on that premise, it is clear that the applicant Schultz must prevail by his being accorded 100% full-time integration versus 51% for his opponent.

For the foregoing reasons, the application of Pepper Schultz for the captioned facilities at Sparks, Nevada may be AND IS HEREBY GRANTED; that being so, the application of Comstock Broadcasting, Inc. for those same facilities, must be AND IS HEREBY DENIED.[4]

IT IS SO ORDERED.

/s/ James F. Tierney
Administrative Law Judge
Federal Communications Commission

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the governing Rules.

FCC 85R-5

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1985 ; Released: January 28, 1985

By the Review Board:

1. The Review Board has under consideration exceptions filed August 29, 1984 by Comstock Broadcasters, Inc. (Comstock) and a reply thereto filed by Pepper Schultz (Schultz); "contingent" exceptions filed August 29, 1984 by Schultz and Comstock's reply; a Motion for Leave to Amend filed December 26, 1984 by Schultz and comments thereon filed by Comstock; a Petition for Leave to Amend filed December 31, 1984 by Comstock and Schultz's opposition thereto; and a Motion for enlargement of Issues filed December 31, 1984 by Comstock and Schultz's opposition thereto. Previously, after a comparative hearing, presiding Administrative Law Judge James F. Tierney (ALJ) found Schultz to be the comparatively superior of these two remaining applicants for a new FM broadcast station at Sparks, Nevada, and granted his application. Initial Decision (I.D.), FCC 84D-49 released July 30, 1984. Oral argument was held before the Review Board on December 12, 1984. For reasons that follow, we find that this proceeding must be remanded to the ALJ to explore patent inadequacies in Schultz's proposed staffing and on a related financial qualifications issue against Schultz.

2. To begin, Comstock's exceptions fault the ALJ for crediting Schultz's ownership integration proposal, contending - as it did below - that the proposal is patently impossible of effectuation.[1] The specific findings and conclusions under exception are set forth at I.D., Ultimate Fdgs. and Conclus., para. 6, and state:

> Schultz for an indefinite initial period, would be the sole employee and operator of the station: he would do all of the announcing, sell all of the commercials, do all of the engineering, billing, etc. until such time as the station had a cash flow sufficient to hire personnel. He stated he has given no thought to what personnel he might hire at that time.

Comstock urges [2]:

> Despite the fact that at commencement of operations, Schultz's station would be operating 24 hours a day (Tr. 44), Schultz stated he had no present plans to hire any personnel. (Tr. 43-44). He represented in his initial application that he would hire zero employees, and confirmed this on cross examination. (Tr. 49). Schultz indicated that he would be the sole operator for an indefinite period of time. (Tr. 44). He stated that he might, in time, hire some people when the cash flow starts coming in. (Tr. 43-44). He estimated that it would take at least one to two months of operation before he could hire any staff to perform some of those duties that he personally would be undertaking after commencement of operations (Tr. 46-47), but he had given no thought as to how many employees he ultimately might need. (Tr. 48). When asked how he expected to operate the station totally by himself for a period of time, Schultz stated that he would use pre-recorded commercials produced by local advertising agencies (Tr. 44). He acknowledged, however, that he would have to do the required station identification announcements every hour.

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[1] Comstock Exceptions at 6-9.

[2] Id., at 7 (emphasis in original).

Comstock asks the Board to judicially notice that Schultz cannot do without sleep for two or three months, that he cannot be on the street selling advertising for the twenty hours per week Schultz proposed while also manning the technical and operational controls of the station, and that Schultz has flatly admitted that he cannot afford employees until advertising revenues reach adequate levels. Faced with this unusual exception, the Board has consulted the underlying record.

The transcript citations fully support Comstock.[3]

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[3] For example:

Q. I see. Now would you briefly describe for us what your duties as general manager - what you envision your role as general manager would be at the station?

A. To keep the station operating; to obtain advertising revenues; provide programming and do billing; and supervise the personnel the station has.

Q. When you say keep operating, are you referring to the technical operation of the station?

A. Yes sir.

Q. When you say obtain advertising revenues, does that mean you intend to do sales yourself?

A. Yes, I do.

Q. And would the same answer be true for providing programming?

A. Yes.

Q. And doing the billing?

A. Yes.

Q. And your last duty described as supervising personnel, do you plan to hire a program director?

A. At the present time, I don't have anybody planned for hiring. I may in time hire some people as soon as the cash flow starts coming in, hire somebody to do these duties.

(continued...)

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[3](...continued)

Q. Make sure I understand your answer. You're saying initially, upon first starting the station up and getting on the air, in essence it will be just yourself?

A. Yes.

Q. And that later, if cash flow is generated, you anticipate possibly hiring some employees?

A. Yes.

Q. How many hours a day will the station be on during this period that you in essence are going to be the sole operator?

A. 24 hours.

Tr. 43-44. At further questioning, Schultz testified:

Q. Thank you, your Honor. To refresh your recollection of the question, Mr. Schultz, I ask you if you had given any thought to ultimately how many employees would be working for you on a full-time basis?

A. None.

Q. None, meaning you have not given any thought, or none -

A. None.

Q. Or none that would not be working for you.

A. None in the respect that I haven't considered it, as far as the number of people to work for me. In other words, I didn't set down and write out I need this many people to do this job and this many people to do that job.

Q. Is it not a fact that when you initially applied to the Commission for this frequency, you indicated in that application filed in October of 1981 that you would employ 0 employees.

A. Myself. It would be 0 employees because the owner would be myself. In other words, hiring somebody else, I would not.

Q. Other than yourself, you would hire 0 employees.

A. Yes, right.

(continued...)

3. At oral argument, Schultz's counsel candidly and properly conceded the damaging hearing representations of his client, [4] but nonetheless argued that Schultz "has friends who can help him out" on a volunteer basis.[5] When the Board pointed out that, throughout Schultz's entire hearing testimony, he made not the slightest reference whatever to volunteer assistance, counsel responded [6]:

> It's not on the record, because there's no issue.

* * *

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[3](...continued)

Id., at 48-49.

[4] For example, while acknowledging that Schultz repeatedly insisted at hearing that he alone would operate the station on a 24 hour per day basis (see supra note 3), counsel submitted "that Mr. Schultz does not propose to operate this station 24 hours a day all by his lonesome forever." Tr. of Oral Arg. of December 12, 1984 at 120. Yet, counsel also admitted:

> He did testify that he was planning to operate the station 24 hours a day. He did testify that that was his intention during the first month or two of operation.

Id. Further, counsel understood that FCC rules require "a licensed operator on duty somewhere," id.; that Schultz has averred that "he is going to be the only employee ... [d]uring the first initial phase of the station operation," id., at 121; and that "when the money started rolling in, he [Schultz] could hire people." Id., at 123.

[5] Id., at 121.

[6] Id. Indeed, on December 26, 1984, Schultz filed a Motion for Leave to Amend to reflect that Schultz intends "to rely on a automated transmission system (ATS) and on help provided without charge by friends to permit his proposed station to operate twenty-four hours per day with no 'employees'." Id., at 1. Putting aside for the moment precisely what Schultz seeks to "amend," the motion will be denied. Post-hearing designation amendments are governed by 47 CFR §73.3522(b), and an amendment will not be accepted unless it meets all six of the "good cause" elements set out in Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970). Schultz 's Motion does not show "good cause"; in general, it simply asserts that "Mr. Schultz has given considerable additional thought to his proposal, and has concluded that the slight modifications made in the attached amendment are necessary." Id., at 2. It seems Schultz now concedes that his original proposal would shortly grind Pepper down with a workload not to be sneezed at. For similar lack of a "good cause" showing, Comstock's Petition for Leave to Amend (to remedy serious problems with the bona fides of its own integration proposal), filed December 31, 1984, will be denied, and all responsive pleading's of both parties' motions are, therefore, dismissed as moot.

> Had a motion to enlarge issues been filed, we would have had an opportunity to respond with an affidavit of Mr. Schultz saying what he proposed to do.

4. While some might ague that Schultz's unambiguous representations summarily nullify his "ownership integration" proposal, which - in totality - appears "inherently incredible"[7], others would contend that the arcane protocols of communications law demand that the addition of a discrete "staffing"[8] issue was necessary before Schultz could be negatively affected by finding that his operational plans are not to be credited. See Tr. of Oral Arg., supra note 4, at 121-122 (Schultz counsel).

5. At the risk of some derision, we will remand this case on appropriate issues to assure that Schultz has adequate notice and

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[7] Cf. Hudson C. Miller, Jr. v. FCC, 707 F.2d 1530, 1539 (D.C. Cir. 1983) (citing Gamble-Skogmo, Inc. v.FTC, 211 F.2d 106,115 (8th Cir. 1954). On the other hand - and technically speaking - a "full-time" integration proposal denotes only that an applicant's principal proposes to devote 40 hours per week to station mamagement. See, e.g., Vacationland Broadcasting Co., Inc., 55 RR 2d 1299, 1303 n.1 and 1304, recon. denied, 56 RR 2d 1260 (Rev. Bd. 1984). and cases cited therein. Comstock does not trifle with the 40 hour per week aspect per se; it is the remaining 128 hours at issue.

[8] "[U]nless an applicant's plans are, on their face, incapable of effectuation, a staffing issue will not be specified in the absence of specific allegations tending to demonstrate that those plans cannot be effectuated." KOWL, Inc., 49 FCC 2d 962, 966 (Rev. Bd. 1974), and cases cited therein. Accord, Brookhaven Broadcasting Co., Inc., 50 FCC 2d 703, 708 (Rev. Bd. 1975) ("where effectuation of a proposal is not inherently improbably," no staffing issue will be specified "absent specific allegations demonstrating that the proposal cannot be effectuated"), and cases cited therein. However, the Commission has specified staffing issues in cases where the proposed staffing has been larger and better defined than the solo 24-hour per day operation proposed in the case at bar. See, e.g., Mace Broadcasting Co., 13 RR 2d 753, 755-756 (1968) (staff of 5 persons proposed for 125 hour weekly schedule was "marginal at best"); Clarkston Broadcaster, 12 RR 2d 1203, 1207-1208 (1968) (staff of 5 persons, only 3 of whom will be actually involved in station on-the-air activities, proposed for 83 hour weekly programming schedule); Sunset Broadcasting Corporation, 5 FCC 2d 321, 323 (1966) (8 person staff; proposed station operation of 71 hours and 45 minutes per week); compare United Broadcasting Company (KBAY-FM, MO&O, 58 FCC 2D 1346, 1357-1358 (Rev. Bd. 1976) (4 fulltime employees plus vague reliance on volunteers; issue specified) with id., Decision, 93 FCC 2d 482, 511-515 (1983) (Comm'n) (issue resolved favorably to applicant based on specific hearing evidence demonstrating "reasonable likelihood" of effectuation).

opportunity to be heard on the obvious concerns. We admonish in advance, however, that contradictions in evidence and testimony will be construed in their ordinary legal fashion and that no comparative "upgrading" over original proposals will be permitted. Furthermore, Schultz's indication that he can hire no employees to help him operate the station until "the money started rolling in" after several months ineluctably raises the issue of whether he has the financial resources to qualify for licenseeship. The Commission requires:

> ... that a new aural applicant must demonstrate that he has a sufficient capital reserve to cover construction costs and that initial start-up period between inauguration of broadcast service and the point where advertising accounts begin to 'pay-off.' We believe that a fairly conservative 90-day standard will serve adequately.

Financial Qualifications Standards For Aural Broadcast Applicants, 69 FCC 2d 407, 408 (1978) (emphasis added). To the extent that Schultz needs to rely on eventual advertising revenues to hire those necessary to operate the station (as proposed for the initial start-up period of several months), he is prima facie out of compliance with our financial standards. And appropriate issue will be added.

6. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed December 26 and 31, 1984 by Pepper Schultz and Comstock Broadcasters, Inc., respectively, ARE DENIED; and

7. IT IS FURTHER ORDERED, That the motion to enlarge issues filed December 31, 1984 by Comstock Broadcaster, Inc. IS DISMISSED as moot; and

8. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issues and the issuance of a Supplemental Initial Decision:

(1) To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and

(2) To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and proof under the issues added herein SHALL BE upon Pepper Schultz.

FEDERAL COMMUNICATIONS COMMISSION

/s/Norman B. Blumenthal
Member, Review Board

FCC 85M-1599

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Issued: April 10, 1985 ; Released: April 12, 1985

1. This will memorialize a ruling at the hearing April 9, 1985, denying Motion for Summary Decision, filed March 19, 1985, by Pepper Schultz (Schultz) seeking, on the grounds urged, resolution in his favor of the two issues added, on remand, by the Review Board. An Opposition was filed on April 2, 1985 by Comstock Broadcasters, Inc. (Comstock). Schultz on April 5, 1985, filed a Motion for Leave to File Supplement to its Motion for Summary Decision, also denied.

2. The added issues are:

> To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and
>
> To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation. (FCC 85R-5, released January 28, 1985).

Schultz predicates its instant Motion on information contained in the Amendment, unopposed, filed February 22, 1985, and listed as Attachment A to the instant Motion. That proposed Amendment reflects

the financial and staffing proposal which Schultz contends fully satisfies and resolves the questions posed in the added issues. Construction and staffing costs would amount to $67,622.60 and, Schultz states, "he has cash on hand in excess of $101,000" with "a cushion in excess of $33,000."

3. In Opposition, Comstock, citing the Review Board's admonition that "contradiction in evidence and testimony will be construed in their ordinary legal fashion and no comparative 'upgrading' over original proposals will be permitted," (FCC 85R-5, at 5), and, argues Comstock, the condition of "co-ownership" of a bank account with his brother, among other imperfections, make the grant of Schultz's Motion impermissible. Schultz would have it that the bank account is freely available to him without condition; that the money advance of his brother is an unqualified "gift" and not a "loan". Not so, argues Comstock, "co-ownership at least casts a shadow of qualification on Schultz's freedom of choice in the use of those funds."

4. But more, Comstock urges, that the Review Board's admonition is ignored by Schultz in "his attempt to reconfigure his plan" and that "his credibility [is] squarely in question"; that, indeed, Schultz is little more than "an incredible, unreliable and wholly unrealistic applicant." In a word, Comstock contends that material questions of fact remain to be resolved concerning both the financial and staffing issues, thus, precluding favorable disposition of Summary Decision in Schultz's favor.

5. Schultz, on the other hand urges that the Review Board's admonition should not be permitted to suggest that he could not change his staffing or financial proposals. Rather, Schultz urges that admonition "means simply that contradiction in evidence will [be] dealt with as they are customarily dealt with." Since Mr. Schultz's staffing proposal has been completely changed (with the exception that Mr. Schultz still intends to be the general manager and chief engineer of his proposed station), there is no contradiction to be found, adds Schultz. This is more so, argues Schultz, that the changes in staffing proposal would not amount to a comparative upgrade because Schultz continues to claim the maximum quantitative integration since he will be the full-time general manager of the facility of which he will be the 100% owner.

6. In summary then, serious and germane questions of fact remain to be determined, particularly respecting the newly proposed staffing system for Schultz, as well as the real nature of the earlier "co-owned" bank account. Hence, clearly a need for direct and cross-examination on those points arise, and thus, Summary Decision may not be granted.

7. Schultz's unopposed Petition for Leave to Amend his application, filed February 22, 1985, seeking to reflect staffing and financial updated information may be AND IS HEREBY GRANTED; and the Amendment tendered therewith ACCEPTED, with the caveat that no comparative advantage is to be gained thereby.

For the foregoing reasons and those reflected in the record at the hearing April 9, 1985, Schultz's Motion for Summary Decision, March 19, 1985, and Motion for Leave to File Supplement, April 15, 1985, must be AND ARE HEREBY DENIED.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

/s/James F. Tierney
Deputy Chief Administrative Law Judge

FCC 85M-1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Issued: May 6, 1985 ; Released: May 7, 1985

1. At hand is a Motion to Enlarge Issues, filed April 5, 1985, by Comstock Broadcasters, Inc. (Comstock) seeking additional issues against its opponent Pepper Schultz (Schultz). Schultz filed an Opposition on April 18, 1985 and Comstock filed its Reply on April 30, 1985.

2. Comstock's Motion urges that four additional issues are warranted against Schultz: (1) a false certification issue; (2) a misrepresentation or lack of candor issue regarding Schultz's financial qualifications growing out of Schultz's February 18, 1985 amendment to his application; (3) a real party in interest issue to determine whether three other persons are undisclosed parties to the Schultz application; and (4) a lack of candor issue regarding Schultz's "various" staffing proposals.

3. False Certification Issue. Briefly, Schultz in his Opposition while conceding that he did not "personally own" all of the resources needed to construct his proposed station in 1982, adds that Comstock's contention "simply does not hold water" in that all that is demonstrated is that Schultz, while exploring various financial options after the release of the Initial Decision, "was fortunate enough to have several options

and that he was prudent enough to explore them." That "[a]ll that is required is that an applicant have a viable plan of financing at the time of filing and continuously thereafter. Flexibility is permitted and that the plan need not remain static . . ." In sum, Schultz states under earlier lease proposals contingent upon credit approval and not then represented by counsel whatever "the fine points of Commission policy. Schultz "believed that the assurances he had received were sufficient to establish his financial qualifications"; that he had been financially qualified in 1982 and, as at this time, his belief "regardless of his actual financial qualifications," was and is sufficient to support his certification and that no basis exists to suggest he intended to mislead the Commission.

4. Misrepresentation Issue. Schultz submits, his representation on February 22, 1985, concerning his financial situation "was entirely accurate." He had funds on deposit in excess of $101,000, and the fact that the account was "co-owned" by his brother, his sister-in-law and a family friend did not preclude Schultz from withdrawal of that sum by him at any time. Indeed, adds Schultz, the fact that the funds are now, since April 1, 1985, in an account owned solely by him answers any contention that the gift from his brother was without substance and a sham. Whatever the speculation of Comstock, Schultz argues, he has "sole access" to the funds, a fact gained by "merely telling his brother that he desired it."

5. Real Party in Interest Issue. Next Schultz states, he "has exclusive control of the funds in an account in his name only. That, whatever Comstock's speculation, there is no evidence that Schultz's brother, or any one else wishes to or can exert any degree of control whatever "over his operation of the proposed station." "Comstock may, of course, entertain such suspicions as it wishes," notes Schultz, but the evidence does not support the notion that "he lied during his deposition." Speculation on the part of Comstock, Schultz argues, does not sustain the premise that someone else "is the real party in interest."

6. Lack of Candor as to Staffing. First, says Schultz, a recital of the facts which led the Review Board to specify a staffing issue, do not disclose that the Board, which might have saw fit to specify lack of candor issue. At least, Schultz would have it, when the staffing issue was added, he "re-thought his staffing plans" and that the better plan "would be simply to hire employees"; and that nothing "sinister" was

conceived by him in his change of plans; hence, it was not meant to mislead any one.

7. Comstock's Reply in essence, claims that ignorance of "fine points" of Commission policy cannot be credited; that this is Schultz's third application for a Sparks, Nevada FM facility and second comparative hearing for the same facility, in which a financial qualification issue was designated against him; that Schultz's failure to disclose the "co-ownership" of his proposed funds at the time of his February 22, 1985 amendment, does permit the premise of non-disclosure of material facts--amounting to misrepresentation--lack of candor; that Schultz is required to meet, not his own subjective standard of financial qualifications, but the Commission's objective standard.

8. On the Real Party in Interest Issue, Comstock further submits in is Reply that under a recent Initial Decision in Virginia Beach Television, Ltd., FCC 84D-87, released December 28, 1984, it was found that despite absence of evidence of actual control of a parent over his child's application and the parties' protestation of no future control or influence, the father was found to be the real party in interest based upon the complete financing by the father of his daughter's venture, albeit there, as footnoted by Comstock, a loan rather than, as here a gift, was involved.

9. Finally, Comstock's Reply concerning the Lack of Candor in Staffing Issue, notes that Schultz does not basically dispute the fact that he has changed his staffing proposals. Actually, says Comstock, Schultz's Opposition when compared with his hearing testimony "corroborates rather than contradicts" Comstock's conclusions that Schultz's proposal of "volunteer" help was a mere fabrication. These inconsistencies alone warrant inquiry into the veracity of his earlier and current proposal on staffing as well, Comstocks urges. Schultz is one who "will tell the Commission anything . . .," whose behavior makes his application a "moving target," concludes Comstock.

10. Though the seeming and various shifting of his positions respecting control of his financial resources and the nature of his staffing proposals appear to make Schultz, what Comstock characterizes as a "moving target," what, at most, remains is an applicant re-grouping to bolster imperfectly articulated positions and proposals; proposals, in part at least, naively thought out and constructed, e.g., Schultz's earlier

notion of wearing "all hats" in his proposed facility for all times and hours until expected revenues would permit other plans. Credulity, a tendency to believe too readily may be subject to an uncommonly rough road here; yet, Schultz's shifting tactics would not be tantamount to incredulous. Certainly, they would not rise to the level of intentional deceit, a cardinal premise to the conditions of misrepresentation and/or lack of candor. "Misrepresentation, both legally and conventionally connotes a false statement of an objective fact intentionally made to deceive," Fox River Broadcasting, Inc., FCC 82R-3, released February 1, 1982 at para. 6.

11. Lack of Candor, on the other hand, is a separate historical wrong or offense, at least in these proceedings, albeit rooted in common theme with misrepresentation, conduct "this side of misrepresentation can be found not forthcoming. Lack of candor, unlike misrepresentation, does not arise directly out of the more universal requirement, that intentionally false statements not be made in connection with an application or adjudicatory proceeding before any federal agency. It arises rather, out of the special status of licensees as trustees of a scared public resources . . . Thus, in proceedings before the Commission involving a licensee or 'would be licensee' misleading conduct which does not necessarily amount to a misrepresentation actionable in other departments may nonetheless warrant a penalty for breach of the standard of complete candor expected by the Commission . . ." Ibid at para. 7. Various examples of the characteristics of lack of candor are also set out there, noting that the core of lack of candor is "omission."

12. In the full light of scrutiny by the guiding precedent of Fox river, supra, neither would Comstock's urgings reach the level of lack of candor on the part of Schultz, whatever misgivings one might have on the embellishments or "re-grouping" pursued by him here.

In a word, even though Comstock premises certain of its arguments on sworn testimony in Discovery and at trial, the necessary premise of evidence of high persuasion underlying Rule 1.229 does not appear; hence, on all ground urged, comstock's Motion to Enlarge must be AND IS HEREBY DENIED.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION
/s/ James F. Tierney
Deputy Chief Administrative Law Judge

FCC 85D-43

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert D. Miller, Jr., Esq. (Koteen and Naftalin) on behalf of Pepper Schultz; David M. Hunsaker (Putbrese and Hunsaker) on behalf of Comstock Broadcasters, Inc.; and Norman Goldstein, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: June 21, 1985 ; Released: June 26, 1985

Preliminary Statement

1. By Memorandum Opinion and Order, FCC 85R-5, released January 28, 1985, the Review Board remanded this proceeding and added the following issues:

a. To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and

b. To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months

operation.

2. A further prehearing conference was held on February 25, 1985 principally setting dates for the hearing of the added issues. On May 19, 1985, Pepper Schultz (Schultz) filed a Motion for Summary Decision which was later denied by Order, FCC 85M-1599, released April 12, 1985. The hearing was held on April 9, 1985 and the record was closed on that date. Proposed Findings of Fact and Conclusions of Law were filed, as directed, by the parties applicant on June 3, 1985; Reply findings were filed on June 14, 1985.

3. Where factual proposals of the parties faithfully reflect the evidence of record, they not only serve the efficient expedition of the administration of justice, they are welcome augurs to the customary burdens of the trier-of-fact, hence, effectively serve the principal objects of the governing rule--rule 1.263 (47 CFR 1.263). Here, the parties have, in the main, honored those notions and liberal use and adoption of the proposals most fine-tuned have been made and adopted, save at times, for preference of language, largely editorial in nature. Proposed conclusions are usually another matter where the poetic license of advocacy permits greater let in the strivings for truth.

4. For the reasons set forth hereinafter, this, as a Supplemental Initial Decision SHALL GRANT the application of Pepper Schultz; that being so, the application Comstock Broadcasters, Inc. MUST BE DENIED.

Findings of Fact

I. Staffing Issue.

5. Schultz, at the time of filing his original application, and until December 12, 1984, intended to operate his proposed station completely by himself, at least initially, by the use of studio automation equipment and an ATS (automatic transmission system). (Tr. 220, 221-222). He did not intend then to use any personnel, hired employees or volunteer help. (Id., p. 220) When Schultz was thinking of using automated equipment, he was relying on information gained through correspondence courses on computers to decide what kind of equipment to buy to run the station as far as billing, selecting proper tape machines, commercials and transmitter parameters. He was not going to write his own programs or build his own equipment. (Tr. 239).

6. Schultz's intention to automate and use no personnel changed after oral argument before the Review Board in December, perhaps due to remarks that remand on a staffing issue was a possibility. (Tr. 221). Prior to the issuance of the remand Order Schultz sought to amend his application to preempt such remand possibility:

> So I amend [made] an amendment at that time, or a brief,to try to get out from having the remand process. So I took an avenue, and I went to some of my friends to get them, I asked them if they would help me out, and they said they would, on staffing of the station. So I was just trying to correct a possible deficiency, which I didn't know if it would come true or not at the time. (Tr. 221-222).

7. Schultz then proffered an amendment to the Review Board (filed on December 26, 1984) indicating that (a) he might not operate 24 hours per day initially as he had previously testified, and (b) he now intended to rely on the volunteer help of six acquaintances.[1] (Id). This amendment was rejected by the Review Board in its Remand Order for failure to make a sufficient good cause showing. FCC 85R-5, p. 4, n. 6; (Tr. 223-224). Thereafter, on February 22, 1985, Schultz petitioned to amend his application, proposing to hire four full-time and six part-time employees. It is on this latest amendment, that Schultz relies to meet the staffing issue added by the Board. (Tr. 223-224).

8. while he has now abandoned the idea of using automation equipment and an ATS system, he may decide to use such a system after the station is operational. (Tr. 225). While he had no timetable for changeover, he indicated that such a move would likely be made after the station is making a profit. (Tr. 226). Alternatively, he stated that he might invest in new equipment for the station. (Tr. 226).

9. According to Schultz's Exhibit No. 2, the proposed staff will have the following duties:

> The three full time announcers will take care of the announcing and will also perform required equipment monitoring functions Mondays through Fridays in eight hour shifts. One announcer

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[1] Schultz's Amendment of December 26, 1984; Official Notice Taken.

> will perform the same duties on weekends, in three eight hour shifts on Saturdays and in three eight hour shifts on Sundays. I will fill in as necessary. In addition to such announcing duties as it may be necessary for me to perform, and in addition to my responsibilities as owner and General Manager, I am qualified to and will perform the duties of Chief Engineer. I will also devote approximately twenty hours per week to selling time on the station. All employees will, of course, perform their duties under my supervision and subject to my direction. (Schultz Ex. 2, p. 5)

10. Schultz does not propose to hire any additional personnel for the first three months other than those listed above. (Tr. 195). Schultz's staff will be required to work in a studio space of 200 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188). Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101 o - 102 o . (Tr. 190). He does not intend to hire any sales staff or news personnel. Id. Schultz proposed to do all of the sales for the station himself. (Tr. 195-196). He expects that he will devote approximately 20 hours per week to selling. (Tr. 196).

11. Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206). Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on hand, and does not plan to purchase initially any cartridge or "cart" record/playback.

12. Schultz described his typical day of getting up at 6:15 a.m., going to work at 7:20 - 7:30 a.m. until 4:30 p.m. He usually goes downtown for dinner and is back home by 6:30 - 7:00 p.m. He takes correspondence course or works at reading FCC materials and planning

for the present proceeding. He normally retires at 10:00 p.m. (Tr. 231-234).

13. On occasion, Schultz's duties as a communications installer and repairer for the Bureau of Land Management requires him to work long hours. This occurs when there is a range fire in the area, and two-way communications equipment is necessary to be installed and maintained for the firefighting command center. (Tr. 235).

II. The Financial Issue.

14. Schultz has $101,000 on deposit in a money market account with First Federal Savings, in Sparks, Nevada. [2] the funds are not in a time deposit, no penalty will be payable for early withdrawal. (Tr. 216). The funds are in his name alone, and while he has the unrestricted ability to withdraw those funds at any time, he has "earmarked" them for the specific purpose of construction and initial operation of his proposed radio station (Tr. 237). He also has $3,500 on deposit in a savings account, and will receive a lump sum payment of $7,500 for his accrued retirement contributions when he resigns from the Department of the Interior Bureau of Land Management (Schultz Ex. No. 2, p. 6). [3]

15. Schultz has no debts other than $20,720.40 owed to communications counsel, which he is paying off at the rate of $600.00 per quarter. (Schultz Ex. No. 2, p. 3; Tr. 200)

16. the funds on deposit with First Federal Savings were a gift from Schultz's brother Marc Simoncini (Tr, 210). There is no expectation,

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[2] The funds were initially in an account held in the name of Mr. Schultz, his brother, his sister-in-law, and a family friend. On April 1, 1985, the funds were withdrawn from that account and placed in an account in Mr. Schultz's name alone. (Tr. 210-215).

[3] If Federal Gift Tax is payable on the funds given to him by his brother, he rather than his brother, will pay the tax (Tr. 212-213). However, it seems apparent that no such tax will be payable, because Section 2505 of the Internal Revenue Code provides for a credit of $121,000. (A copy of the pertinent provision of the Code was provided by Schultz, Official Notice Taken.) The gift to Schultz of $101,000 was less than the amount of the available credit. Accordingly, only an information return will have to be filed. This rationale is disputed in Comstock's Reply Findings, infra, it appears.

by Schultz or by Simoncini, that the gift will be "repaid," because it is not a loan (Tr. 215). Schultz does, however, feel that he is under a moral obligation to repay his brother's kindness at some time in the future (Tr. 215). Despite this feeling of moral obligation on Schultz's part, Schultz stated that there will be no "repayment" of the gift until after the station becomes profitable and that he has no intention of taking any steps which would impair the ability of his radio station to operate. (Tr. 215).

17. Schultz proposes to construct his radio station as follows:

(a) He will purchase a used transmitter and associated equipment from KTDY(FM), in Lafayette, Louisiana for $10,000, in cash. (Tr. 238). The equipment is presently in use by KTDY(FM) but will no longer be needed when the station improves its facilities in June of 1985 (Schultz Ex. No. 2, p. 1). Schultz has discussed the purchase of the equipment with KTDY(FM)'s chief engineer, Pat Shirley, who agreed to advise him should anyone else make an offer on the equipment. Schultz has a "right of first refusal" on the equipment. (Tr. 182).

Schultz estimates that the cost of transporting the equipment from Lafayette, Louisiana to Sparks, Nevada will not exceed $2,500 [4] and states that should the equipment no longer be available when he obtains a construction permit other comparable equipment is readily available at comparable prices (Schultz Ex. No. 2, p. 1).

(b) Schultz will obtain additional equipment, including an antenna transmission line, and STL system, from Broadcast Services Company, in Sparks, for $17,961.05 plus shipping charges of $200. Auxiliary power equipment will be acquired from Nevada Generator Systems, in Sparks, for $4,957 plus freight ($317.76) and taxes ($298.50) (Schultz Ex. No. 2, pp. 1-2).

(c) Schultz already owns the following studio equipment, which he testified will be all that he requires to operate the station initially:

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[4] This figure was obtained by doubling and then adding $500 to a previously received quote on shipping more equipment from Greely, Colorado to Sparks. Mr. Schultz testified that Lafayette is approximately 710 miles from Sparks, while Lafayette is approximately 1500 miles from Sparks (Official Notice Requested).

Item	Number
Microphones (broadcast quality)	2
Microphones (voice grade)	2
Turntables	4
Tonearms	4
Reel-to-reel tape recorders	2
Cassette record and playback	2
Cassette playback only	3
Blank tape	2 boxes
Broadcast mixer board	1
Monitor que amp	1
Line amplifiers	2
Speakers	4
Mixers	2
Over air monitors	2

All of the above listed equipment is broadcast quality, with the exception of the two voice quality microphones and one of the two cassette recorders, which is adequate for playback purposes but does not record adequately for broadcast use (Schultz Ex. No. 2, p. 3). Schultz also owns studio and office equipment, including four tables, four chairs, a book shelf, and a four drawer filing cabinet. He has a library of in excess of five hundred phonograph records (Schultz Ex. No. 2, p. 3).

(d) The equipment is to be acquired by Schultz will be installed under his supervision and with his assistance by Broadcast Services Company, at a total cost of $1,130 (Schultz Ex. No. 2, p. 2).

(e) Electrical and telephone installation will cost a total of $1,744.00 (Schultz Ex. No. 2, p. 2).

Schultz's total construction costs will, therefore, be $39,126.26 (Schultz Ex. No. 2, p. 3). [5]

Schultz costs to operate the facility for the initial three-month period will be as follows:

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[5] There may be additional costs of no more than $2,500.00 for spare parts for the transmitter and associated equipment (Tr. 184).

Studio and office rental (5 months)	$3,000.00 [6]
Telephone service	266.40
Electric power	2,381.60 [7]
Office supplies	1,100.00 [8]
Employee costs	18,720.00
Automobile expenses	258.00 [9]
Total	25,726.00

18. Schultz needs $910.00 per month for personal living expense (Schultz Ex. No. 2, p. 6), and is obligated to pay his attorneys $600 every three months in respect of prior legal fees (Schultz Ex. No. 2, p. 3). He has no other financial obligations. (Schultz Ex. No. 2, p. 3).

19. Schultz's total costs of construction and initial operation of $64,852.26, plus $2,500 worth of spare transmitter parts, five months living expenses ($4,550) and payments to his attorney of $200 per month over a period of one year ($2,400), will amount to $74,302.26 which is $37,697.74 less than the $112,000 cash available to him from the account at First Federal Savings, his $3,500 savings account and the

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[6] This is based on a charge of $1.00 per square foot per months for three hundred square feet of transmitter space and three hundred square feet of studio-office space. The $1.00 per square foot figure was obtained from the proposed lessor of Schultz's transmitter space, in a "high rent district" of Reno. Schultz testified that rental charges in Sparks, where his studio-office will be located are significantly lower, on the order of $0.50 - $0.60 per square foot, and that he is aware of several available sites there (Tr. 194). However, the high $1.00 per square foot figure was used for both studio and transmitter space, to be conservative (Tr. 188-189).

[7] During cross examination, Mr. Schultz revised his initial projection of $2,181, upward by two hundred dollars to provide for five, rather than three months electricity use to his proposed studio (Tr. 193).

[8] Schultz stated that his projection of the cost of office supplies is probably excessive (Tr. 229).

[9] Schultz will be using his personal automobile, a Volkswagen Beetle, (Tr. 236) for station related duties and that it will probably need more fuel than is presently the case. Mr. Schultz testified that his automobile gets approximately 240 miles per tank of gasoline, and that tank of gasoline costs approximately $10.75. (Tr. 237).

Assuming that Schultz will drive 500 miles per week on station business (which seems a very high estimate), the additional fuel will cost him $86.00 per month or $258 during the initial three months of operation.

more than $7,500 lump sum payment [10] he will receive from the United States government when he resigns his position. (Tr. 199).

20. While Schultz wanted to hold the option to use the $101,000 on deposit at First Federal as collateral for a loan to purchase necessary equipment, he will use the funds to make the purchases should such financing prove unavailable on acceptable terms. (Tr. 215-118; Tr. 238-239).

Ultimate Findings and Conclusions

III. Staffing Issue.

21. In adding this issue, the Review Board, while expressing some possible disdain in its remand, noted that Schultz be given assurance of "adequate notice and opportunity on the obvious concerns" adding that "[w]e admonish in advance, however, that contradictions in evidence and testimony will be construed in their ordinary legal fashion and that no comparative 'upgrading' over original proposals will be permitted." (FCC 85R-5 at para. 5). Yet, though Schultz's earlier notion to operate his proposed station with no employees suggested Herculean commitment, this side of realism, given further and sober thought, albeit afterthought, he did amend his application to propose a more enlightening staffing proposal. (See Memorandum Opinion and Order, FCC 85M-1599, released April 12, 1985, para. 7). That amendment was unopposed and was accepted under governing law with the caveat of no comparative advantage.

22. The Schultz latest staffing proposal of a full-time staff of five (three announcers, a secretary and himself) and a part-time staff of six (all announcers) for the type of facilities here appears reasonable. To say this, no enhancement is endowed to Schultz under abiding comparative cannons. Simply stated, his first proposal smacked of seeming naivete' faced with the customary demands of a start-up operation of an FM station. Yet, then as now, Schultz would be credited with the important comparative criterion of 100% integration of ownership and management, buttressed, of course, with the more realistically promising staffing proposal. Under such conditions the

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[10] According to the wage statement he receives every two weeks, more than $7,500 is now available in his account. (Tr. 198).

penetrating discernment of the remanding authorities has been, in this mind, not only vindicated but, more to the point, met and honored by Schultz's corrective response in his amendment. The standards of ordinary legal meaning would neither be disparaged or demeaned under these circumstances, bottomed on the properly amended original Schultz proposals. Had Schultz been denied his quest to amend, his whole standing may have been fatally imperiled. Azalea Corp., et al., 31 FCC 2d 561, 563.

23. Thus, while Schultz's latest staffing proposal might be "frugal, rigorous and demanding," he is a relatively young person in apparently good health, unmarried and accustomed to long and trying hours and hardships in his present occupation confronting "range fires" and "other emergencies"; the evidence would not suggest that he would be unable to fulfill his commitments, however supposedly Herculean. Hence, it is found under the evidence that Schultz's staffing proposal is adequate to effectuate his object. Cf. Bisbee broadcasters, Inc., 31 RR 2d 71 (Rev. Bd., 1974).

24. Financial Issue. Schultz relies on three sources of funds to meet his estimated costs and personal expenses: $3,500 in two bank accounts, a distribution of retirement earnings in the amount of $7,500 which is to be expected upon resignation of his U.S. Government position, a resignation he would effect in order to construct and operate the proposed station; and $101,000 from his brother, which is a savings and loan account, an amount which Comstock emphasizes as a "gift".

25. While repeating a dark shadow of doubt respecting the full efficacy of Schultz's $101,000 "gift" urging that a Federal Gift Tax would attach to someone, Comstock nevertheless urges that Schultz's estimate of total costs of $64,594.26 and a surplus of $36,045.74, from "this cushion one must subtract additional Comstock itemized costs of $75,382 leaving ultimately, including "the cushion," of a deficit of $38,976. (Comstock
Proposed Findings at 28-29).

26. In his Reply Findings, Schultz rejects the deficit comments projected above by Comstock saying-- that his proposal to purchase a used transmitter for $10,000--is realistic and with reasonable assurance not only from Schultz's discussion with Station KTDY(FM)'s chief engineer, but also in the marketplace of used radio transmitting

equipment; Schultz also would have it that the Comstock thesis that Schultz's testimony is but "hearsay." Noting that Comstock's challenge of "hearsay" occurred after Schultz had been excused following cross-examination, Schultz, citing McCormick on Evidence, Chapters 25-37 - West Publishing Co. 1954, relates that "the tendency is toward, rather than away from the receipt of such evidence." That notion is the true state of the Law of Evidence, in this view, and particularly so in these premises where the Federal Rules of Evidence apply but also where those Rules may be relaxed to serve the ordinate ends of justice. But even putting aside that observation, nothing that Comstock speculates would undermine the reliability of Schultz's proposals concerning the availability of the equipment he intends to purchase and, hence, his $10,000 for the transmitter, be it used or other, would remain unaffected as an item of cost; not the $40,000 Comstock suggested new transmitter cost.

27. Much the same may be said for the other Comstock projected additional costs concerning legal fees--$20,724.40 with continued payments of $600 by Schultz every three months until that sum is eliminated and no other payments to be made until after the completion of the third month of operation and none whatever during the current remand; the projected payments on a $60,000 loan--a loan not relied on or planned save for Schultz wishing "to hold open" such an option; lastly the Comstock projected gift tax on the $101,000 under Section 2505 of the Internal Revenue Code, as annexed by Schultz in his Reply Findings, would not require him "to make any tax payments" on that gift.

28. Schultz would agree that his "financial proposal inadvertently made no provision for an auxiliary power generator," though he would have "ample funds" to acquire a second generator, he would concede a slight comparative demerit under precedent for that oversight. Whatever Comstock's projected deficit items, the evidence would allow that, in any event, Schultz would still have a financial cushion of at least $22,000, assuming there were substance to such projections.

29. In its Reply Findings, Comstock concedes that Section 2505 of the Internal Revenue Code provides for a credit against gift taxes up to $155,800 in the tax year 1986 with lesser amounts in earlier tax years. But, urges Comstock, the tax is still imposed even though Schultz's donor brother "may opt" to charge the gift tax against unified credit in

his estate; the fact is that Schultz stated he would pay the tax; that, in any event, the gift is not "free" without significant tax consequences. Also, now that Schultz "has now changed his story" to allow his brother's estate to pay the tax after all, this is a further example of the "vacillation of Mr. Schultz and clear evidence of his lack of credibility and non-reliability."

30. Comstock attacks the feasibility, indeed the possibility of Schultz's being able to meet the additional costs Comstock calculated against him, a sum in excess of $75,000. Comstock lists a series of "forgots" by Schultz. He "forgot" about auxiliary power--a "forgot" conceded; he "forgot" station refurbishing and installation costs--Schultz claims possession of all studio necessities and can perform all installation himself; he "forgot" about the summer heat at Sparks, Nevada, thus, air conditioning costs; Schultz responds that a converter blower (flow air transfer) would be sufficient; also Comstock disparages Schultz's plans and schedules to pay off his legal fees, as well as Schultz's unsupported reliance on a "used transmitter" at a price of $10,000.

31. Apparently, Schultz's counsel is not displeased with Schultz's proposed payments and payment schedule and "that no legal fees beyond those amounts will be paid until after completion of the third month of operation" (Schultz, Ex. No. 2; Schultz Reply Findings at 9). Likewise, concerning the "used transmitter" and as noted earlier, Comstock's afterthought objection on the "hearsay" nature of Schultz's testimony, the availability of that equipment premised on station's KTDY(FM) chief engineer's stated selling price of $10,000, is reasonably certain; indeed, a substantial number of used FM transmitters are available for purchase at approximately $10,000, Schultz adds. (Schultz Ex. No. 2, p. 1; Schultz Reply Findings at 12).

32. Comstock denigrates Schultz's latest staffing, plan, beside other imperfections, a need for "one additional announcer for a 24-hour operation" and that this is the latest in a constantly shifting and moving plan of Pepper Schultz"; that no precedential comparison is possible here with the Bisbee case, surpa, and that "Schultz has acted at best with willful myopia, or at worst, hapless legerdemain," citing Dutchess Communications Corp., FCC 85R-49, released June 13, 1985 at 16). Were rhetoric to rule the day here, comstock should prevail by a virtual light year. Traditionally, and funtunately* (*ERRATUM July 1, 1985 "funtunately" should read "fortunately" and is so changed.), that is not

the touchstone in these proceedings.

33. While Schultz may be seen, under the evidence, as something less than a wizard at planning the myriad details of a start-up FM broadcast operating, his latest efforts, particularly in his amendment accepted in FCC 85M-1599, April 12, 1985, adequately address the staffing issue imposed on remand in all of its common attributes; employees, five full-time including himself; hours of work, studio space, his multifaceted duties, many perhaps difficult, but not beyond his ken or endurance, and sundry other manning requirements. Cf. United Broadcasting Co. (KBAY-FM), 53 RR 2d 57 (1983). In like manner, Schultz has adequately responded to and met his assigned burdens concerning his financial qualifications, a companion matter set forth in remand. Whatever the nature of the origins and metamorphoses from loan to unqualified gift from a sibling donor, the $101,000 appears unqualifiedly available and also appears fully adequate to underpin his financial qualifications with a sizeable cushion of approximately $22,000.

For the foregoing reason, Schultz has reasonably met and discharged his burdens under the added issues; he remains the better candidate for choice of the public franchise there in Sparks, Nevada; besides his earlier established qualifications, his 100% integration of ownership and management remains and is a far better quantitative comparative proposal than the greatly flawed, however resourcefully contrived, distribution of authority by Comstock addressed in the Initial Decision.

That being so, this as a Supplemental Initial Decision SHALL FIND IN FAVOR of Pepper Schultz under the issues added on remand and shall affirm the earlier grant of the Schultz application; consequently, the application of Comstock Broadcasters, Inc. MUST BE DENIED. [11]

IT IS SO ORDERED.

/s/ James F. Tierney
Deputy Chief Administrative Law Judge
Federal Communications Commission

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[11] This being a Supplement to the Initial Decision, FCC 84D-49, released July 30, 1984, the rights of review and appeal attach, as in the case of the Initial Decision itself, under Rule 1.276 (47 CFR 1.276).

FCC 86R-2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert D. Miller, Jr., on behalf of Pepper Schultz; and David M. Hunsaker and Denise B. Moline, on behalf of Comstock Broadcasters, Inc.

DECISION

Adopted: January 14, 1986 ; Released: January 24, 1986

By the Review Board: MARINO (Chairman), JACOBS, BLUMENTHAL.

Board Member BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Pepper Schultz (Schultz) and Comstock Broadcasters, Inc., (Comstock) for authority to construct a new FM broadcast station to operate on Channel 221 at Sparks, Nevada. [1] By Hearing Designation Order, 48

[1] A third competing application, that of Red Rock Broadcasting Corp., was previously dismissed by the ALJ at the applicant's request pursuant to a settlement (continued...)

Fed. Reg. 51858, published November 14, 1983, the applications were designated for consolidated hearing on the standard comparative issue, including a comparison of the applicant's respective coverage of areas and populations. In an Initial Decision (I.D.), FCC 84D-49, released July 30, 1984, presiding Administrative Law Judge (ALJ) James F. Tierney granted the Schultz application after concluding that "Schultz must prevail by his being accorded 100% full-time integration [credit] versus 51% for his opponent." I.D., Consls., para. 30. After considering the parties' exceptions to the I.D. and oral argument held before the Review Board on December 12, 1984, we remanded the proceeding to the ALJ on issues:

(1) To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and

(2) To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

Memorandum Opinion and Order, FCC 85R-5, released January 28, 1985 (Rev. Bd.) (hereinafter "Remand Order"). In a Supplemental Initial Decision (S.I.D.), FCC 85D-43, released June 26, 1985, the ALJ resolved both of the remand issues favorably to, and reaffirmed the grant of the application of, Schultz.

2. The proceeding is now before the Review Board on exceptions to the S.I.D. filed by Comstock and Schultz's reply. The board has reviewed the S.I.D. in light of the exceptions and briefs and our examination of the record. [2] In light of our review, we must reverse the ALJ's erroneous conclusion that Schultz is basically qualified to be a licensee, and we grant the Comstock application.

3. In its exceptions, Comstock does not take issue, in the main, with

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[1](...continued)
agreement, see Memorandum Opinion and Order, FCC 84M-1615, released April 3, 1984, and therefore is not before us for consideration.

[2] We shall deny Comstock's request for oral argument because we believe that such argument would not materially aid in the resolution of this case. See Section 1.277(c) of the Rules, 47 CFR §1.277 (c); Van Buren Community Service, 87 FCC 2d 1018, 1019 (Rev. Bd. 1981).

the S.I.D.'s basic factual findings, [3] but instead urges that "Schultz's revised staffing proposal remains inadequate to permit operation of the station on a reasonable basis," Comstock Br. at 11-15; that the ALJ "erred in concluding that Schultz was financially qualified," id. at 18-25; and that Schultz's comparative standing should be downgraded "as a result of [his] fluctuating position on staffing and integration," id. at 15-18. [4] Schultz supports the ALJ's conclusions that his amended staffing plan is capable of effectuation, Schultz Reply at 10-17, and that he is financially qualified, id. at 2-9.

4. Staffing Issue. When he filed his application on May 19, 1982 and until December 26, 1984, Schultz repeatedly insisted that he would operate the proposed station completely by himself during the initial three-month period. S.I.D., para. 5; I.D., Concls. para. 6. Schultz indicated that he would have no money for hiring employees for a period of several months "When the money started rolling in." Remand Order at n. 4; see also id. at n. 3 (quoting hearing transcript of Schultz testimony). He apparently had a hazy idea that, by using studio automation equipment and an automatic transmission system, he could somehow operate the station for several months as a total one-man show, 24 hours per day, with no human assistance of any kind. Id.; Tr. 43-49, 220. That is, Schultz testified that he intended to personally operate the station, including the performance of all the necessary announcing, engineering, sales, news, programming, business functions, etc., I.D., Conclus., para. 6, with no staff whatever. AT oral argument held December 12, 1984, we made apparent our skepticism over Schultz's patently incredible staffing proposal. See Tr. of Oral Arg. at 119 et seq. Realizing, then that a remand on a staffing issue was legally unavoidable, Schultz hastily filed a motion for leave to amend his application to substitute an entirely new staffing proposal, therein specifying reliance "on an automated transmission system (ATS) and on

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[3] Comstock does claim that the S.I.D should have found Schultz's costs of station construction and initial operation to be higher. As will be seen infra, this exception is decisionally insignificant.

[4] Comstock also avers that the ALJ erred in denying its motion to enlarge issues to add false certification, real party in interest, misrepresentation, and lack of candor issues against Schultz. Comstock Br. at 4-10. In light of our ultimate conclusion herein, we do not reach this exception, but agree - for reasons stated infra - that Schultz's original "certification" of financial ability was hollow. Were he not otherwise found disqualified, a hearing on Schultz's candor would be obligatory.

help provided without charge by friends [six acquaintances] to permit his proposed station to operate twenty-four hours per day with no 'employees.'" See Remand Order, at n. 6. We there denied Schultz's motion because he wholly failed to demonstrate "good cause" for the amendment in accordance with the tenets of 47 CFR §73.3522, see id., and we remanded the case, inter alia, on a staffing issue because Schultz's operational plans in this regard were, on their face, incapable of effectuation. Remand Order at paras. 4-5 and n. 8 (citing KOWL, Inc., 49 FCC 2d 962, 966 (Rev. Bd. 1974), and Brookhaven Broadcasting Co., Inc., 50 FCC 2d 703, 708, (Rev. Bd. 1975)). [5] In remanding, we admonish that no new staffing proposals should be proffered; instead, the remand hearing was simply to provide Schultz with a due process opportunity to demonstrate, if possible, how his facially absurd proposal could be effectuated. Id., at para. 5.

5. Nonetheless, on February 22, 1985, Schultz filed before the ALJ a motion for leave to amend to specify yet a third staffing proposal, upon which proposal he now seeks to rely. See S.I.D., paras 9-10. The ALJ, without performing the necessary "good cause" analysis, granted this motion, see id., para. 7, and the third staffing proposal is embodied as the new Schultz Exhibit 2. Schultz concedes, as it must, that its current staffing proposal is an entirely new proposal, and not simply a minor refinement of earlier plans:

> While I had originally intended to hire no employees during the initial period of operation, and to rely on help provided by friends at no charge, I have changed my plans and not intend to hire... employees.

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[5] In essence, those cases hold that we will not question an applicant's intended staffing unless effectuation is "inherently improbably." See, e.g., Brookhaven Broadcasting, 50 FCC 2d at 708. Schultz staffing - or rather, lack thereof - appeared not only "improbably," but a priori impossible. When confronted, at hearing, with Schultz's outlandish assertions, a staffing issue should have been added immediately; and - with due respect - the ALJ should not have remained passive in the face of Schultz's startling admissions. Furthermore, we all but ignore counsel's flummery suggesting that Schultz's insistence that he would utilize no "employees" did not necessarily negate a reliance on friends and volunteers. This post-hoc ratiocination is directly contradicted both literally and by general implication in Schultz's hearing testimony. See Remand Order at n. 3.

Schultz Exh. 2 at 4 (emphasis added). We hold that the ALJ's unauthorized grant of Schultz's amendatory motion was reversible error.

6. In general, the Commission demands that an applicant have its proposal in order at the time it files its application. Although it may amend prior to the specified cut-off date as a matter of right, so as to accomplish any last-minute adjustments or firming-up, all basic arrangements necessary to pursue the application should be completed before a full comparative hearing on any competing proposals is to commence. See 47 CFR §73.3522; Belo Broadcasting Corp., 68 FCC 2d 1313, 1320 (1978) ("the application should be finalized in advance of the start of the actual hearing"); Dutchess Communications Corp., 101 FCC 2d 243, 254-255 (Rev. Bd. 1985). Should an applicant seek subsequently to alter its proposal, it must satisfy a six-part "good cause" test so as not to delay the proceeding or prejudice competing applicants. Dutchess Communications, supra, 101 FCC 2d at 255. That is, it must demonstrate: (1) due diligence; (2) involuntariness; (3) no modification or addition of issues or parties needed; (4) no disruption to hearing or need for additional hearing; (5) no unfair prejudice to other parties; and (6) no competitive advantage gained. Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970).

7. As we recently emphasized in Dutchess Communications, supra:

> In the case of changes in [an] application proposal which go to basic qualifying matters, the Commission has recently relaxed its 'good cause' standards, Anax Broadcasting, [87 FCC 2d 483 (1981)], but those seeking to avail themselves of the Commission's equity in this regard must make some showing of good faith on their part.... On the other hand, an applicant may not proceed... without seriously confirming the rudimentary struts of its proposal; and, in the manner of Dickens' Mr. Micawber, hope that 'something will turn up.'

101 FCC 2d at 255 (footnote omitted; emphasis added). With regard to the proposals intended in its application, an applicant must be "ready, willing, and able" to effectuate. Id., at 254 (emphasis in original).

8. Here, it is evident that Schultz did not begin to meet the Erwin O'Conner "good cause" test for amending his application; and, therefore, the ALJ erred in accepting it. First, Schultz was far from

diligent in developing a wholly new staffing proposal after completion of the entire comparative hearing, and even after release of the I.D. and after the Board's oral argument. That his amendatory motion was filed within 30 days of the release of our Remand Order is insufficient to render a finding of due diligence, because his failure to timely finalize his application at the appropriate time, see Belo Broadcasting, supra, or, at least, to take reasonable, good faith steps to do so, obliterates any equities that could excuse his prolonged failure. Compare Dutchess Communications, supra, 101 FCC 2d at 249-252 (lack of timely, serious efforts to arrange bank financing demonstrated lack of due diligence and warrented rejection of amendment) with Anax Broadcasting, Inc., 87 FCC 2d 483, 489 (1981) (submission of financial amendment promptly after obtaining crucial bank letter and within a few days of the deadline for amendments as of right raised sufficient equities to warrant its acceptance). Second, the amendment was necessitated by Schultz's failure to consider seriously the need to employ a staff competent to operate a broadcast station. Most critically, Schultz's failure to take reasonable steps to timely develop a bona fide staffing proposal has grossly delayed this proceeding. As was made abundantly clear in Adjudicatory Re-Regulation, 58 FCC 2d 865, 871 (1976), the broadcast application process is not a "paint-by-numbers" exercise, in which applicants fill in their proposals, even as they proceed through comparative hearings - and beyond. Such a process is inconceivable, an schultz's post-hearing dabbling with his application is the antithesis of the fair, orderly process established by the Commission. Belo Broadcasting, supra. Further, because he utterly failed to satisfy four of the six criteria of the Commission's test for "good cause", Schultz's 1985 motion for leave to amend should have been denied. Having filed his application in May, 1982, it should not have taken Schultz nearly 3 years to appreciate that a round-the-clock radio operation would need some minimum semblance of a staff. His insistence throughout the comparative hearing that he alone would perform all of the myriad functions of an ongoing broadcast station - with neither sleep no surcease - constituted irrefragable evidence that Schultz was either distantly out of touch with reality or singularly qualified for the laurel of "FCC Fabulist of the Decade." [6]

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[6] Schultz's solo, 168 hour per week proposal is to be distinguished from that of the celebrated Simon Geller. Geller, though a one-man symphony, was on the air for only

(continued...)

9. Therefore, the answer to the question of whether Schultz could effectuate his record staffing proposal is a foregone conclusion. We find nothing in the hearing record to refute our perception in the Remand Order that there was no likelihood of Schultz being able to effectuate his superhuman proposal. And, we find no basis in law (or equity) for accepting an amendment nearly three years after the filing of an application which - for the first time - recognizes that staff, any staff, would be a useful element in running a full-time broadcast station. Schultz's record lack of a credible staffing plan renders him unqualified to be a licensee. Cf. United Broadcasting Company (KBAY FM), 93 FCC 2d 482, 511-515 (1983) (despite lack of some precision, staff of 4 paid full-time persons, i.e., sales director, engineer, news director, and "access" director; and pledges of 143 hours from 13 volunteers, found adequate to meet staffing issue).

10. Financial Issue. This issue was concurrently added because we found that "Schultz's indication that he can hire no employees to help him operate the station until 'the money started rolling in' after several months ineluctably raise[d] the issue of whether he has the financial resources to qualify for licenseeship." Remand Order at para. 5. At the remand hearing, the ALJ permitted Schultz to amend to reliance on a $101,000 money market account deposit with First Federal Savings, Sparks, Nevada, to meet proposed costs of construction and initial operation of $74,302.26. [7] This $101,000 was an allegedly recent "gift" from his brother and sister-in-law, S.I.D., para. 16, a post-application "certification" largesse we refuse to credit (even if Schultz's amended financial proposal were procedurally permissible). Of his estimated costs, $10,000 was allocated for the purchase of a used transmitter and associated equipment from Station KTDY(FM),

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[6](...continued)
40 hours a week during the 1972-75 renewal period, and later on a 72 hour per week basis. Simon Geller, 90 FCC 2d 284, 287 n. 2 (ALJ 1978) (subsequent history omitted). Geller claimed to have worked 85 hours a week at the station, id., at 295, and his programming was almost exclusively recorded music. Id., at 286. Geller, of course, did no public interest programming of any kind, thereby placing his very license at peril.

[7] Schultz was also said to have available $3,500 in savings, and would receive a lump sum payment of $7,500 for his accrued retirement contributions when he resigns form his current employment with the Department of the Interior Bureau of Land Management. S.I.D., para. 14. He also claimed approximately $300 in a credit union account. Tr. 201.

Lafayette, Louisiana, id., para. 17(a), which equipment Schultz claims to have a right of first refusal to obtain. Id. Schultz does not actually have a transmitter available at present and has no definite plan to obtain one. Id.

11. The Commission requires that radio station applicants have sufficient financial resources to meet their costs of construction and initial three-months operation. See GACO Communications Corp., 94 FCC 2d 761, 781-782 and n. 72 (Rev. Bd. 1983), aff'd as modified, FCC 84-212, released May 14, 1984 (Comm'n). although Schultz "certified" with his application that he had the necessary financial resources, Schultz Application, filed May 19, 1982, FCC Form 301, Section III, it is clear that Schultz, at the time of certification, and made no serious arrangements whatever for the requisite funding. The best Schultz could assert was:

> It is true that Mr. Schultz did not personally own all of the resources needed to construct and operate his proposed station in 1982. However, he believed that he had ready access to all of those resources; as demonstrated by the ease with which he obtained the funds when it became appropriate to do so by virtue of the grant of his application in 1984, his expectation was entirely reasonable.
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> * * *
>
> Mr. Schultz also believed that he would be able to obtain the necessary funds. As indicated in his attached statement, he had been in contact with financial institutions and equipment suppliers, by telephone and by mail; had discussed terms with them; and believed that upon grant of his construction permit the necessary resources would be available.

Schultz Opposition to Motion for Enlargement of Issues, filed April 18, 1985, at 2-3 (emphasis added). However, the Commission has made clear [8]:

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[8] Dutchess Communications, supra, 101 FCC 2d at 246 n. 4 (quoting Brief of FCC in James L. Oyster v. FCC, No. 84-1562 (D.C. Cir. 1984), at 3-4 (footnote omitted; emphasis added).

> It is not sufficient for an applicant to simply believe that it will be financially qualified by the time it obtains a construction permit. Instead, as summarized in the current version of the FCC Form 301, an applicant must certify that it has sufficient net liquid assets on hand or available from committed sources to construct and operate the proposed station for three months without revenue. Moreover, if some or all of the financing is to be provided by others, the applicant must have reasonable assurance of a present firm intention for each agreement to furnish financing. The applicant must be able and willing to meet all contractual requirements with respect to collateral, guarantees, and capital investment, and the applicant must have determined that a reasonable assurance exists that all sources other than financial institutions, banks, and equipment manufacturers have sufficient net liquid assets to meet their commitment. Revision of Form 301, ... 50 Rad. Reg. 2d (P&F)[381,] 382, 397 [1981]. See GACO Communications Corp., 94 FCC 2d 761, 775 (Rev. Bd. 1984), review denied, FCC 84-212. released May 15, 1984; United Broadcasting Co. (KBAY-FM), 93 FCC 2d 808, 832 n. 101 (1983).

Schultz, of course, alleged no such firm arrangements with financiers.

12. At the remand, the ALJ found that Schultz claimed to be relaying on two sources of funds (other than a purported $101,000 "gift" from his brother and sister-in-law which, inter alia, was interposed too late in the proceeding to receive legal cognizance). They were: (1) $3,500 in two bank accounts; and (2) a distribution of retirement earnings in the amount of $7,500 expected upon resignation of Schultz's U.S. Government job. S.I.D. at para. 24. Plainly, these two sources were not sufficient to meet his proposed costs of $74,302.26. However, after oral argument and the Board's addition of the issue to determine whether he had sufficient funds to cover his costs of construction and initial operation, Remand Order at para. 8(2), Schultz sought leave to amend his application to show that he now had "savings on deposit with First Federal Savings of Nevada in excess of $101,000.00 cash subject to withdrawal at any time." Schultz Motion for Leave to Amend, filed February 22, 1985, Att. F. This post-hearing amendment was thoroughly unacceptable, for while we give equitable leeway to those seeking to overcome basic disqualifying issues, Anax Broadcasting, supra, 87 FCC 2d at 489, there must be made a showing of timely good

faith. Dutchess Communications, supra, 101 FCC 2d at 255. Here, no "good cause" whatever was shown for this particular "after-the-ball-was-over" amendment.

13. Even so, as to the alleged $101,000 "gift", we agree with Comstock that a "dark shadow of doubt" surrounds the bona fides of the intrafamilial transfer of funds. See S.I.D., para. 25. The $101,000 was first asserted in Schultz's February 22, 1985 motion for leave to amend as funds available to him and withdrawable by him at any time. However, in undisputed testimony elicited at a deposition session held March 15, 1985, Comstock Opposition to Motion for Summary Decision, filed April 2, 1985, Exh. b (hereinafter "Dep. at ___"); see also Schultz Reply at 21-22 (quoting Schultz testimony at deposition), it was revealed by Comstock that Schultz had merely been made a co-signatory on a savings account owned jointly by his brother, the brother's wife, and another family friend. Dep. at 33-34. This maneuver was made only after Schultz asked his brother to guarantee a bank loan he intended to apply for, id., at 42-44, an arrangement apparently unacceptable to the brother. The $101,000 represented solely the savings of Schultz's brother and his brother's wife, id., at 36-37, and it is freely conceded that Schultz's name was placed on the account "to qualify [him] to get ... a permit and get it on the air." Id. at 35. Subsequently, in opposing Comstock's April 5, 1985 motion to enlarge issues which sought the addition of false financial certification, financial misrepresentation, real party-in-interest, and lack of candor issues against Schultz, Schultz supplied an April 12, 1985 affidavit from his brother stating that:

> In mid March, Pepper advised me that his attorney had advised him that the commission might have some concern over the bona fides of the gift, in view of the joint nature of the account. Since it was my view that the money was Pepper's to do with as he pleased, I had no objection whatever to withdrawal of the funds or to the opening of a new account in Pepper's name alone. I cooperated with him to this end.
>
> I have no desire for any financial or other interest in Pepper's proposed station, and there is no understanding between us that I or anyone else will be given any such interest. Nor do we have any agreement or understanding concerning "repayment" of the gift. It is a gift, not a loan.

Schultz Opposition to Motion for Enlargement of Issues, filed April 18, 1985 at Attachment B. However, Schultz and his brother never discussed the considerable federal gift tax ramifications of the purported gift, Tr. 212; Schultz absently suggested that, if a gift tax were imposed, he would pay it because "I wouldn't expect him to pay anything on it." Tr. 213. In short, we view this last-minute, hastily arranged "gift" of $101,000 as a very possible sham. More, indeed, would be necessary to substantiate the remarkable claim that, without promise of repayment or an equity interest in the station, Schultz's brother and sister-in-law casually signed over to him what appears to be their life's savings, for it is not unknown for a sibling to pop in at the last moment with a belated transfer of valuable assets in an attempt to shore up a troubled financial proposal. Cf. WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1138-1144 (D.C. Cir. 1985). [9]

14. Schultz's Exceptions. We have also considered Schultz's exceptions to the original I.D. and, in light of our disqualification of Schultz, do not reach those which pertain exclusively to the comparative issue. See Schultz Contingent Exceptions at 12 et seq. The remaining

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[9] Other circumstances surrounding this curious "gift" further lessen our confidence in its credibility. Thus, despite our admonition that a party claiming an asset should reveal whether the legal ownership is qualified, WHW Enterprises, Inc., 89 FCC 2d 799, 807-808 (Rev. Bd. 1982), Schultz's February 22, 1985 amendment (George Washington's Birthday, no less) indicating funds on deposit of $101,000 contained no such qualification. It remained for Comstock to learn, at later deposition, that - lo and behold - the $101,000 actually belonged to his brother and sister-in-law (and a third party), Schultz merely being made a co-signatory to the account to permit him to claim the funds as available for station financing. Comstock Br. at 6. Only after Comstock's discovery of this cozy arrangement were the monies transferred to an account in Schultz's name. See id.

Raising additional doubt is the amazing fact that, despite the claims of a "no strings attached" conveyance of $101,000, Schultz testified at subsequent hearing that he might not draw upon this windfall for financing the station, but might instead use it solely as "collateral" for a cash bank loan. Tr. 237-239. Just why Schultz might offer the bank his free found $101,000 ready cash for a lesser cash loan is unexplained, but we are certain that the hard-pressed banking industry would gladly rather receive tribute than pay it. We'd take the deal ourselves.

Hence, even were Schultz's February 1985 financial amendment procedurally permissible and cognizable, it could lead to no more than a lack of candor issue to test the bona fides of this convenient bonanza.

exception that the ALJ erroneously permitted Comstock to change its transmitter site before hearing, see id. at 7-11; Memorandum Opinion and Order, FCC 84M-2280, released May 15, 1984, we must deny. The records shows that Schultz had filed a pre-hearing petition to dismiss, which petition claimed that Comstock's site would be a substantial hazard to air navigation. Comstock promptly consulted with its legal and engineering consultants who, in turn conferred with appropriate FAA Western Regional Office personnel. Comstock Reply at 6-7. Applying FAA technical criteria, Comstock's consultants found errors in the FAA letter to Schultz concerning Comstock's site and they calculated that there was no air hazard problem with its site which, in fact, was an existing radio tower formerly used by a station operating at higher power and frequency levels. Id. at 6. On February 3, 1984, an FAA Western Regional official sent a letter to the presiding ALJ - but not to Comstock - indicating problems with Comstock's site. After considering whether to prosecute an appeal with the Washington Office of the FAA, and deciding not to, Comstock filed a transmitter site amendment on March 23, 1984, four days before the hearing commenced. We affirm the ALJ's ruling that Comstock has demonstrated "good cause" for its amendment. Comstock was diligent in undertaking to resolve the issue with the FAA and, when it could not, in amending to specify an unobjectionable site. For this reason, Outer Banks Radio Co., 13 FCC 2d 385 (Rev. Bd. 1968), and Shoblom Broadcasting, Inc., 53 RR 2d 1203 (Rev. Bd. 1983) (subsequent history omitted), relied upon by Schultz, are readily distinguishable. The site amendment was not voluntary, nor did it delay the proceedings, nor did it prejudice Schultz.

Conclusions

15. This case, while perhaps a fluke, does nevertheless illuminate the downside risks of a much simplified application process, through which channels occasionally slip those without the barest ability to construct and operate a full power broadcast station, let alone possessing the considerable resources requisite to serving the American public in the manner to which it has become accustomed. See, e.g., Dutchess Communications, supra; GACO Communications Corp., supra. While we have not previously encountered so threadbare an applicant as Schultz, we do reiterate our concern that more attention be given to an applicant's basic qualifications at the front end of the application process, so as to avoid the elaborate farce reflected in theses extended

proceedings. [10] We would hope that notice of these matters will be taken in sisterly quarters, with an eye toward a more active scrutiny at the earliest application review stage. [11]

16. But for the unnecessary time and appreciable public expense caused by Schultz's aired application, this case is not entirely without a strain of mellowing pathos. Pepper Schultz, a humble employee of the Department of Interior's Bureau of Land Management, with $3,500 in personal savings and a meager $7,500 in his federal retirement account, S.I.D., para. 13, [12] ventured to Washington with the proposal to build and operate - all by himself - a full service Nevada radio station. Schultz's plan (and lack of supporting resources) called for him to operate, on a 24 hour per day schedule, unassisted for the first several months, his individual chores to include all of the programming, sales, bookkeeping, engineering, FCC recordkeeping, etc. S.I.D., para. 5. Apparently accepting the patent impossibility of his notions only after oral argument on the exceptions to the hearing I.D., Schultz filed on December 26, 1984 an amendment proposing to use automated transmitting equipment, as if that minor measure would overcome the transpicuous hopelessness of the balance of his proposal. As to that sorely belated amendment, the ALJ reports:

> When Schultz was thinking of using automated equipment, he was relying on information gained through correspondence courses on computers to decide what kind of equipment to buy to run the station as far as billing, selecting proper tape machines, commercials and transmitter parameters. He was not going to write his own programs or build his own equipment.

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[10] Again, as indicated, some of the fault for the unnecessary prolongation of this case must be placed on the presiding ALJ, a decent man whose well-known patience and mercy were here taken advantage of by an applicant more to be pitied than pampered. A swift disqualification of Schultz at the initial hearing state was provided by the law; the temporization caused only waste, delay and injustice to the qualified competing applicant and - more importantly - to the public.

[11] The application processing staff might have noted that a financial issue had been added against Schultz in a broadcast application proceeding just prior to Schultz's 1982 "certification" of financial ability in this proceeding. See FCC 81D-10, released March 11, 1981, BC Docket 79-174. It also might have noticed that, apparently, Schultz's application itself indicated that Schultz "would employ 0 employees." Tr. at 49

[12] These assets must be offset by his (then) current legal tab of $20,000, S.I.D., para. 15, a deficit he was said to be retiring at $600 per quarter.

S.I.D., para. 5.[13] Even now, Schultz urges that he be permitted a construction permit to operate with not much more in the way of resources than might be required for, say, a modest roadside fruitstand, and in an environment that would have daunted and depressed the desperate denizens of Devil's Island.[14]

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[13] In any event, Schultz has apparently now abandoned the uneducated illusion at ATS equipment was the panacea. It is not known whether Schultz completed his computer "correspondence courses," or whether he had merely advanced sufficiently to realize that neither R2-D2 nor C3-PO was a "stock" equipment item.

[14] We need not detail all of the deficiencies of Schultz's amended proposal, for they are amply described in the S.I.D. Suffice it for our's and the reader's purposes to note:

> Schultz's staff will be required to work in a studio space of [3]00 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188). Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101 o - 102 o. (Tr. 190). He does not intend to hire any sales staff or news personnel. Id. Schultz proposes to do all of the sales for the station himself. (Tr. 195-196).
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> * * *
>
> Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206). Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on had, and does not plan to purchase initially any cartridge or "cart" record/playback.

S.I.D., at paras. 10-11. It goes on, and it is sad to further note that this proposal comes from a man who did once receive a broadcasting construction permit, but was compelled to turn it back to the Commission. The reason for Schultz's failure to effectuate the prior permit is reflected below:

> MR. BLUMENTHAL: He wasn't sleeping up at Sparks?
>
> SCHULTZ COUNSEL: No, no. He was under pressure. He was hospitalized with a nervous breakdown.

(continued...)

17. We do not know if Schultz was (or is) serious about his proposal, is incurably deluded, or merely covets the permit in the hope of quick enrichment. Schultz's staffing and financial proposals of legal record are untenable. And, as to his impermissible post-hearing amendments:

> We cannot allow the [applicant] to sit back and hope that a decision will be in its favor, and then, when it isn't to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Colorado Radio Corp. v. FCC, 118 F.2d 24,26 (D.C. Cir. 1941) Even in this age of reduced burdens of licenseeship, see Deregulation of Radio, 84 FCC 2d 968 (1981) (subsequent history omitted), Schultz has been painfully exposed as far unequal to that public burden. That it has taken from mid-1982 to reach this inevitable conclusion is an unfortunate comment on the administration of our own public burdens.

18. ACCORDINGLY, IT IS ORDERED, That the request for oral argument filed September 3, 1985 by Comstock Broadcasters, Inc. IS DENIED; and

19. IT IS FURTHER ORDERED, That the application of Comstock Broadcasters, Inc. (File No. BPH-820628AQ) for authority to establish

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[14](...continued)

> CHAIRMAN MARINO: Well, that's what I'm asking about.
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> SCHULTZ COUNSEL: Well, that's not on the record.
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> * * *
>
> MR. BLUMENTHAL: This is a man who, 15 years ago was hospitalized with a nervous breakdown, and here proposes to be the sole employee, to do everything from -- all the announcing, sale of all the commercials, do all of the engineering, billing, and so forth, until such time as he had a cash flow sufficient to hire personnel. This is the --
>
> SCHULTZ COUNSEL: For a brief period, that is his stated intention.

Tr. of Oral Arg. at 130.

a new FM broadcast station at Sparks, Nevada IS GRANTED, and that the application of Pepper Schultz (File No. BPH-820519AK) IS DENIED.

/s/ Normal B. Blumenthal
Member, Review Board
Federal Communications Commission

FCC 87-74

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

ORDER

Adopted: February 27, 1987 ; Released: March 9, 1987

By the Commission:

1. Before the Commission are: (1) an Application of Pepper Schultz for Review of a Review Board Decision filed February 24, 1986; (2) Comstock Opposition to Schultz Application for Review filed March 11, 1986; and (3) Reply of Pepper Schultz to Opposition to Application for Review of a Review Board Decision filed March 26, 1986. These pleadings relate to a Decision of the Review Board granting Comstock's application for a new FM radio station of Sparks, Nevada and denying Schultz's application. *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986).

2. We agree with the Board's resolution of this case. We wish, however, to comment on one matter. After the Board remanded this proceeding to the ALJ for an examination of Schultz's staffing proposal and financial qualifications, Schultz offered corrective amendments. The ALJ accepted these unopposed amendments, but the Board rejected them and disqualified Schultz. As a matter of general practice we would not ordinarily expect the Board to review acceptance of an unopposed curative amendment. We note, however, that acceptance of

a post-cutoff amendment is subject to a finding of good cause. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1982); *Erwin O'Connor*, 22 FCC 2d 140 (Rev. Bd. 1970). Accordingly, in a situation like this where good cause for acceptance of the amendment was patently lacking in the evidence, review of the ALJ's action was appropriate.

3. In the instant case we agree that a notable lack of good cause precludes acceptance of the amendments. As the Board notes, the record indicates that Schultz had lacked diligence in formulating his initial staffing and financial proposals. Under these circumstances there are no equities justifying Schultz's being permitted to moot questions concerning his lack of qualifications by means of a last minute curative amendment. We find Schultz's financial proposal particularly troublesome because Schultz certified in his application that he was in compliance with the Commission's financial requirements. Contrary to the conclusions of the ALJ, we agree with the Review Board that further hearings would be required to explore the *bona fides* of Schultz's representations in light of the record developed concerning Schultz's proposals.[1] This factor further militates against a finding of good cause.

4. The equities of this case do not resemble those in *Washington's Christian Television Outreach, Inc.* 99 FCC 2d 395, 402-08 (Rev. Bd. 1984). *rev. granted in part*, 59 RR 2d 787 (1985). *recon. denied*, 59 RR 2d 1679 (1986). *appeal pending*, No. 85-1649 (D.C. Cir.). which Schultz asserts should control this case. In *WCTO*, the Board held that an ALJ had been unduly harsh in rejecting an applicant's financial showing and remanded to give the applicant a further opportunity to prove itself qualified. The applicant in that case had submitted commitments from a bank and an equipment supplier, which the ALJ had found technically defective. Following the remand, the ALJ expressly suggested that the applicant might receive a favorable

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[1] *See* FCC 85M-1994, released May 7, 1985. When the Commission eliminated the detailed financial questions from the application form, it did not intend to change the substantive law concerning financial qualifications. *Revision of Form 301*. 50 RR 2d 381, 382 (1981). The new form specifically requires the applicant to certify that "net liquid assets are *on hand* or are available from *committed sources*." FCC Form 301 (January 1982), Section III [emphasis added]. As the Review Board notes (103 FCC 2d at 1054, 1058-59). Schultz's certification was not consistent with this standard, in that he had neither cash resources nor a loan commitment at that time.

summary decision if it submitted an alternative proposal. Although the Board had not contemplated that an alternative proposal would be filed, it upheld the ALJ's acceptance of the applicant's amendment containing the substitute, on the grounds, *inter alia*, that it would be inequitable to further abridge the applicant's diligent efforts to demonstrate its qualifications. Here, by contrast, as explained above, the equities strongly militate against acceptance of the amendments.

5. IT IS ORDERED, That the Reply of Pepper Schultz to Opposition to Application for Review of a Review Board Decision IS DISMISSED.[2]

6. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application of Pepper Schultz for Review of a Review Board Decision filed February 24, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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[2] This pleading is not authorized by the Commission's Rules. Section 1.115(f) of the Commission's Rules. *See Adjudicatory Re-regulation Proposals*. 58 FCC 2d 865, 876 (1976).

FCC 87I-065

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

ORDER

Adopted: June 26, 1987 ; Released: June 29, 1987

1. Before the Commission are a Petition for Reconsideration filed April 8, 1987 by Pepper Schultz and an Opposition filed April 21, 1987 by Comstock Broadcasters, Inc. (Comstock). These pleadings relate to an Order by the Commission upholding a Review Board Decision granting Comstock's application for a new FM radio station at Sparks, Nevada and denying Schultz's mutually exclusive application. Pepper Schultz, 103 FCC 2d 1052 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd 1476 (1987).

2. The Commission's Order rejected arguments by Schultz that the Board erroneously found him unqualified to be a Commission licensee. Schultz argued that the Board erred in refusing to accept amendments designed to cure deficiencies in Schultz's original financial and staffing proposals. The Commission agreed with the Board that there was no good cause for accepting those curative amendments. Without these amendments, Schultz was not qualified.

3. In his Petition for Reconsideration, Schultz essentially reiterates arguments already considered by the Commission in denying his Application for Review of the Board's Decision in this proceeding. As

the Commission has often stated, it will not grant reconsideration merely for the purpose of permitting reargument of matters previously considered.[1] However, notwithstanding the rule, it appears desirable to seek clarification of one aspect of Schultz's petition. Schultz notes that, after the Board remanded this proceeding to the Presiding Judge for a reexamination of "Schultz's staffing and financial proposals, he offered corrective amendments, which were accepted by the Presiding Judge. Because the Board rejected those amendments, Schultz now argues that he should have been given the opportunity to show in the remanded proceeding that his original staffing and financial proposals, without the amendments, were adequate. Petition at 4-5.

4. Although the present record contains considerable evidence regarding Schultz's original staffing and financial proposals,[2] it appears desirable to ascertain what additional evidentiary showing Schultz believes he could have made if there had been an evidentiary hearing on his original staffing and financial proposals, in order to determine whether a remand is warranted. Thus, Schultz will be given the opportunity to submit to the Commission a statement indicating what further showing could be made as to the sufficiency of those proposals. He should submit affidavits or declarations containing the substance of any testimony he would have introduced and should attached copies of any proposed exhibits. He may also include an explanatory pleading of no more than then pages. Comstock will have the opportunity to file a response of no more than ten pages.

5. ACCORDINGLY, IT IS ORDERED, Pursuant to Section 0.251(f)(8) of the Commission's Rules, that Pepper Schultz IS REQUESTED to file a submission as described in the preceding

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[1] Section 1.115(g) of the Commission's Rules provides that a petition requesting reconsideration of a ruling which denies and application for review will be entertained only if: (1) the petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

[2] See, e.g., Pepper Schultz, 103 FCC 2d at 1054, 1058-59; 58 RR 2d at 435-37; FCC 85D-43, released June 26, 1985 at Fdgs. para. 5; FCC 84D-49, released July 30, 1984 at Concls. para. 6; Opposition to Motion for Enlargement of Issues, filed April 18, 1985 by Pepper Schultz, Attachment A.

paragraph within 30 days of the release date of this Order; and that Comstock Broadcasters, Inc. may file a response within 15 days after the filing of Schultz's submission.

Diane S. Killory
General Counsel

/s/ by John I. Riffer
Associate General Counsel

FCC 88-85

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: February 29, 1988 ; Released: March 11, 1988

By the Commission:

1. This matter comes before the Commission for further action concerning a Petition for Reconsideration filed April 8, 1987 by Pepper Schultz. That pleading, in turn, related to an order by the Commission upholding a Review Board decision granting the application of Comstock Broadcasters, Inc. for a new FM station at Sparks, Nevada and denying Schultz's mutually exclusive application. *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd 1476 (1987).

I. Background

2. The procedural history of this case is as follows. In an initial decision, (now) Deputy Chief Administrative Law Judge James F. Tierney (ALJ) granted Schultz's application, based on his finding that Schultz had a superior proposal for integration of ownership into management. *Pepper Schultz*, FCC 84D-49 (July 30, 1984. The Review Board, however, on its own motion added issues questioning the adequacy of Schultz's existing staffing and financial proposals and

remanded the proceeding for further hearings. *Pepper Schultz*, 58 RR 2d 434 (Rev. Bd. 1985). Following remand, Schultz tendered amendments providing new approaches intended to cure any deficiencies in his existing proposals. The ALJ accepted these unopposed amendments and found Schultz qualified. *Pepper Schultz*, 103 FCC 2d 1066 (Admin. L.J. 1985).

3. The board then reversed the ALJ a second time. *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986). It held that no good cause existed for accepting the curative amendments, primarily because Schultz had lacked diligence in formulating his original proposals and had grossly delayed the proceeding. The Board further held that Schultz's original, unamended staffing and financial proposals were not viable, thereby rendering Schultz unqualified. The Commission denied review of the Board's action. *Pepper Schultz*, 2 FCC Rcd 1476 (1987).

4. Schultz then filed the pending petition for reconsideration. After reviewing the petition, the commission's General Counsel determined that the submission of further information by the parties would aid the Commission's deliberations. *Pepper Schultz*, FCC 871-065 (June 29, 1987). Because the Board rejected Schultz's curative amendments which the ALJ had found satisfactory, Schultz argues that he should have been given a further opportunity to show that his original staffing and financial proposals, without amendments, were adequate. Although the present record contains evidence compiled during the hearings before the ALJ regarding Schultz's original proposals, the General Counsel believed it desirable to clarify what evidence Schultz might have offered if he had been given a further opportunity. Moreover, the adequacy of Schultz's proposals as of 1982 might conceivably reflect on the question of whether good cause exists for permitting amendments of those proposals.

II. SUBMISSIONS BY THE PARTIES

5. In response to the General Counsel's order, Schultz filed an evidentiary submission on August 7, 1987, and Comstock replied on August 31, 1987. Schultz contends that his submission demonstrates that his original, unamended staffing and financial proposals were viable.

A. *Staffing Proposal*

6. Schultz states that, during the first few months, the proposed station would operate on a fully automated basis seven days a week, 24 hours a day. However, if necessary, he would operate no less than 12 hours a day, six days a week. He further reports that he would be aided by several friends, who have volunteered to perform technical and other duties when he is absent from the station. Additionally, Schultz states that he would hire paid employees soon after the station begins operation as justified by cash flow and his experience with the station, and that he would devote substantial time to advance time sales to increase his initial advertising revenues. Schultz asserts that his proposal to serve initially as the station's only full time staff represents a demanding but not impossible undertaking, especially given that Schultz is unmarried, has few responsibilities, and is accustomed to working long days. Schultz acknowledges that at one time he planned to use an automatic transmission system monitored by a local telephone answering service-burglar alarm company when he was not present at the station. He concedes that he abandoned this plan when he realized that it would violate a Commission requirement that monitoring must be done by station employees. *Automatic Transmission Systems*, 39 RR 2d 677, 681 (1977).

7. Comstock responds that the proposal described by Schultz contradicts his previous testimony. According to Comstock, Schultz originally did not propose to use volunteer assistance, nor did he propose to rely on advance time sales to facilitate the hiring of paid staff. Comstock contends that Schultz did not formulate these modifications of his original intentions until after the Board took issue with his staffing plans at the first oral argument. Thus, Comstock argues that Schultz cannot honestly characterize this plan as his original, unamended proposal and that, therefore, the plan should not be considered at this juncture. Moreover, Comstock questions whether Schultz's plans to rely on volunteers and preselling are feasible.

8. The pleadings before us raise substantial and material questions of fact which relate to Schultz's qualifications to be licensee and, therefore, should be explored at an evidentiary hearing. First, we are troubled by the seeming discrepancy between Schultz's evidentiary showing, now before us, and the present record. For example, the Board in its remand order found that Schultz had not previously referred to using volunteers to run the station. 58 RR 2d at 437. Moreover, the ALJ's

findings in the supplemental initial decision seem to support Comstock's allegation that the proposal set forth in Schultz's submission is not his original plan, but one first formulated in an amendment reject by the Board. *Pepper Schultz*, 103 FCC 2d at 1067-68. The present record provides no basis on which to resolve this dispute. Accordingly, a further hearing is necessary to decide this substantial and material question of fact. We also find a substantial and material question of fact as to whether the virtual one-man operation of Schultz's proposed commercial FM radio station can be effected. We therefore remand this proceeding for further hearings.

B. Financial Proposal

9. Schultz maintains that at the time he certified his financial qualifications in his application he intended to construct and operate the station with the resources available at the time of the grant. He states that he believed that he could work out a lease-purchase arrangement with an equipment supplier or obtain a bank loan, but that he had not reached any definite agreement on either score. Rather, he asserts that his financial qualifications were demonstrated by the fact that he had sufficient resources on hand to construct and operate the station even without further financial arrangements. The Commission requires applicants to certify that they have sufficient funds to construct the proposed station and operate it for three months. *Revision of Form 301*, 50 RR 2d 381, 382 (1981). In support of this contention, Schultz submits a balance sheet indicating that, at the time he filed his application in 1982, he had available funds of $31,542 to meet estimated costs of construction and operation of $16,900.

10. Comstock questions several aspects of Schultz's financial proposals. It considered Schultz's listing of costs and funds available as flawed and not credible. Furthermore, Comstock maintains that Schultz's present showing is inconsistent with his prior testimony in which he did not assert the availability of the assets he now claims.

11. We find that the pleadings before us raise substantial and material questions as to Schultz's financial plan. As in the case of Schultz's staffing proposal, we are troubled by the seeming discrepancy between his present showing and the existing record. We note, for instance, that Schultz previously submitted a pleading which stated:

> It is true that Mr. Schultz did not personally own all of the

> resources needed to construct and operate his proposed station in 1982. However, he believed that he had ready access to all of those resources; as demonstrated by the ease with which he obtained the funds when it became appropriate to do so by virtue of the grant of his application in 1984, his expectation was entirely reasonable.

Opposition to Motion for Enlargement of Issues, filed April 18, 1985 at 2-3. (Schultz was referring to an amendment in which he reported that his brother had recently given him $101,000 for the station.) This assertion appears to be contradicted by a statement in Schultz's present submission:

> However, his financial certification was not based on these hopes and beliefs; it was based entirely on the funds and used equipment reasonable available to him at the time, and he has at all times been prepared to go forward with the bare-bones facility upon which his financial certification was predicated should it be necessary to do so.

submission in Response to Commission Order of Pepper Schultz, filed August 7, 1987 at 5 (emphasis in original deleted.) As mentioned, Schultz supports this latter assertion with a balance sheet -- which he did not previously submit, even though he had the opportunity to do so. Additionally, in view of the circumstances in which Schultz submits his listing of funds and costs, Comstock should have an opportunity to test the reliability of these figures.

III. ORDER

12. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed April 8, 1987, by Pepper Schultz IS GRANTED to the extent indicated and IS DENIED in all other respects; and this proceeding IS REMANDED to the Presiding Judge for further evidentiary hearings in accordance with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FCC 88M-1334

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ
Sparks, Nevada

MM DOCKET NO. 83-1206
File No. BPH-820519AK

COMSTOCK BROADCASTERS,INC.
Sparks, Nevada

MM DOCKET NO. 83-1207
File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Issued: May 2, 1988 ; Released: May 4, 1988

1. At hand is "Submission in Response to Remand Order," (Submission) filed April 12, 1988 by Pepper Schultz (Schultz); "Response and Opposition" (Response) to that Submission, filed April 22, 1988 by Comstock Broadcasters, Inc. (Comstock). Both pleadings address the invitation at the further prehearing conference, March 22, 1988, of the forum to do so, and particularly concern the full reach of Memorandum Opinion and Order, FCC 88-85, released March 11, 1988 (Remand Order), wherein the Commission found, among other matters, a need for further hearing to resolve the open question whether Schultz possesses the basic qualifications to construct and operate his proposed station at Sparks, Nevada.

2. Schultz's Submission categorically asserts, indeed reaffirms, his contention that he "was fully qualified, financially and otherwise when his application was filed"; that "[t]he amendment submitted at the first Remand Hearing was properly accepted and its acceptance should now be confirmed, if that is necessary to permit grant of his application." (IV Summary - Schultz Submission).

3. Schultz adds that "[a]s to the staffing proposal [he] would have

found it difficult to operate his proposed station all alone on a twenty-four hour per day basis, seven days a week, during the initial phase of operation with neither employees nor unpaid helpers. Even before the flaw in his originally contemplated automated transmission system (ATS) plan was pointed out to him, Schultz had intended to rely to the limited extent necessary on help from a few of his friends to the extent necessary. When the flaw in his ATS system was pointed out, he solidified that plan and obtained affidavits from several friends, promising to help out. Those were submitted as part of his amendment which the Review Board rejected" (Summary ii). Schultz also suggests or concedes "it seems
possible that reliance on the 1985 amendment to support a grant now might well lead to further litigation . . . There appears to be no pressing need for consideration of the 1985 amendment now . . ." (Submission p. 18)

4. The Submission continues, "[s]ince Mr. Schultz... was fully qualified in 1982 and remains fully qualified to construct and operate his proposed station on the original basis, there may be no need to consider the 1985 Amendment which was previously accepted and on the basis on which his application was previously granted. However, the proposal contained in that amendment remains fully viable in every respect and would also support grant of his application." (Summary iii.) (Emphasis added.)

5. On that score, the Remand Order at bar, notes "[b]ecause the Board rejected Schultz's curative amendments which the [trial forum] had found satisfactory, Schultz argues, that he should have been given a further opportunity to show that his original staffing and financial proposals, without amendments, were adequate. Although the present record contains evidence compiled during the hearings before [the Trial Judge] regarding Schultz's original proposals, the General Counsel believed it desirable to clarify what evidence Schultz might have offered if he had been given a further opportunity. Moreover, the adequacy of Schultz's proposals as of 1982 might conceivably reflect on the question of whether good cause exists for permitting amendments of those proposals." (Remand Order at para. 4.) (Emphasis added.)

6. Briefly, the comprehensive Submission Schultz urges that he was financially qualified in May 1982 and remains so; that although his original staffing proposal required an automated transmission system to

be capable of effectuation on a twenty-four hour per day, seven-day per week basis, the "flaw" in that respect of the proposal is not a "fatal" flaw, since the Commission's rules permit operation on much less than a twenty-four hour per day, seven-day per week basis; that Mr. Schultz is perfectly capable of operating with or without assistance from his friends for the seventy-two hours per week which the Commission rules do require (Rule 73.1740 - 47 CFR 73.1740). Verified Attachments to Schultz's Submission reflect "Balance Sheet as of May 19, 1982 and as of Now"; cash deposit of $27,291.72, April 11, 1988, net value $46,115.49; 1988 Statement Money Market Plus Account 3245.272 shares; Equipment Leasing Proposals April 7, 1980; August 30, 1982; July 29, 1982; August 25, 1982, September 24, 1982 and others in July April/May 1981. These Schultz submits as demonstrative of his financial qualifications in 1982, as well as now. The now apparent viability would be fully persuasive but for the rejection of his 1985 amendments by the Review Board. His 1982 financial balance sheet report appears adequate with a small surplus available, as a cushion over construction and operation costs; net liquid assets of $17,158 in 1982 ($120,072 as at present). This, notwithstanding Comstock's general disparagement of Schultz's financial resources in its Opposition at paras. 10 through 15 and elsewhere.

7. What is of particular, if not crucial, concern at this point is the adequacy of his original staffing proposal, and whether that adequacy prompts a fair premise or good cause for permitting amendments in that regard, a matter particularly addressed in the instant Remand Order, at para. 5, supra.

8. In like manner Comstock's Response and Opposition, in a word, characterizes Schultz's Submission as demonstrative of "a propensity to dissemble," to be awarded a "T for Tenacity", but lacking in "reliability and trustworthiness." Next, Comstock notes that Schultz in his initial testimony on the Staffing Issue "unequivocally" stated he would operate his station on a 24-hour a day basis without assistance; that the Commission "was perplexed and troubled" by the Schultz Submission to the commission's General Counsel concerning his staffing proposal and use of "voluntary help" is understandable inasmuch as "he would have no human assistance, paid or otherwise." (Comstock Response p. 4 para. 4.) (Emphasis in original.)

9. Concerning the Financial Issue affecting Schultz, in much the same

vein Comstock asserts that the "glaring inconsistencies" of his record testimony demonstrate that he was not financially qualified on May 19, 1982 and miscertified his financial qualifications to the Commission. Neither the August 1987 Submission (to the General Counsel) nor the instant Remand Submission establishes the adequacy of his 1982 financial plans, says Comstock, and the test of that adequacy by evidence prompted the Commission to observe "might conceivably reflect on whether good cause exists for permitting amendments of those proposals." That condition of inadequacy clearly supports the notion that "no good cause existed nor now exists for acceptance of the February 1985 amendments" adds Comstock.

10. While pointedly cautioning against new acceptance, of the Schultz 1985 amendment as "an invitation to commit clear reversible error" (underscored in original), Comstock then suggests that "even if [those amendments] are accepted, Schultz remains unqualified." Dare one at this stage face that supposed fearsome calamity?

11. At some length Comstock challenges Schultz's reliance on language in Armando Garcia, FCC 88R-15, released March 7, 1988 (Rev. Bd.), which in turn cited Merrimack Valley Broadcasting, Inc., 82 FCC 2d 165, 168 (1980), where, among other matters, it is stated:

> Experience shows that permittees do not usually have difficult obtaining credit for equipment purchases. Hence we will now question an applicant's ability to do so upon a specific showing that its credit-worthiness is subject to doubt.

Comstock states "[h]e couldn't be more wrong" because the certification of financial qualifications of May 1982, was totally bereft of reliable documentary evidence in support of the Schultz leasing arrangements; a far cry, insists Comstock, from the conditions in Armando Gracia and because Schultz's credit-worthiness "is subject to doubt" he may not rely on Merrimack Valley, Comstock further contends. Finally, the adding of a qualifying issue by the Review Board's earlier Remand, Comstock submits, "does not, in and of itself provide sufficient good cause for acceptance of a curative amendment, such as the Schultz 1985 amendments," citing Costal Bend Family Television, Inc., 54 RR 2d 367, 371 (Rev. Bd. 1983).

12. A fair reading of the Schultz and Comstock submissions reveals

that little of decisional moment has been added to the long journey of this protracted proceeding. Neither party has substantially retreated from earlier positions, thus, neither shed sufficient guiding light on a clear course heading for easy resolution of the matters reposing in the instant Remand. Whether further explanation into the mind and conduct underlying the Schultz 1982 proposal may prove fruitful, helpful or needed at this late day (though an open question) may provide rational grounds for a last revisit to the well of compelling persuasion.

13. Comstock footnotes that its understanding of the instant Remand Order requires further Schultz's testimony "subject to cross-examination"; that that understanding is "without prejudice" to its position under Ashbacker (Ashbacker Radio, Inc. v. FCC, 326 U.S. 327 (1945)) and the Administrative Procedure Act to cross-examination of Pepper Schultz on his total Submission if the Presiding Judge is asked to rely on such written testimony on at bar. Comstock my misconstrue the so-called "Ashbacker Rights." In no place does Ashbacker mandate an oral hearing or oral cross-examination; indeed none of the panoply of customary trial is ordained; simply, that one is entitled to a hearing where, as here, a statutory right is preserved. That hearing, at most, must accord a party to be heard, that is, as conceived under the Administrative Procedure Act, be accorded the basic elements of Due Process, in a word, fairness. Thus, an entirely written case, be it a "paper case" or the like fully comports with the reach of Ashbacker. Here that case in all of its essentials has been experienced; and then some. Also, were one to suggest notions of "demeanor" evidence or findings, that, too, has been ventilated here in full abundance on the original issues and the rational remainder of those issues now art bar; in a word, all witnesses to this date, have been in the legal sense of scrutiny or observation, fully "demeaned."

14. What then is the residuum of the Submission at hand? Schultz concedes the "flaw" in his original staffing but not his financial qualifications and insists that staffing "flaw" is not a "fatal" one. Comstock equally insists, buttressed by Attachments from local advertising agencies and broadcast station principals, that Schultz then, at the beginning, and now, proposes a "totally unrealistic" "wishful thinking", "a proposal [that] would not fly" hence, without any substance in support of his thesis; Schultz might simply be awarded a "T for Tenacity" and nothing more. Were that not enough to doom him, and were Schultz found to be basically qualified, Comstock, even

at this late hour, would insist on "adding and exploring lack of candor issues as suggested by the Board". One shudders at that unfriendly prospect, hence with respectful deference, will be ignored. This, if only for the reason that, at most, Schultz, hypothetically, however misguided in his notions and belief that he was financially and otherwise qualified, did not by that supposed misconception fail in candor either in his application when he so certified or at any time during his testimony at hearing. Nowhere can it be found that Schultz's representations of record rise to the level of intentional deceit or fail in the duty of being forthright, forthcoming or honest. Cf. Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1135-1137 (Rev. Bd. 1982). Naive, tenacious, wishful thinker or other, as some might say perhaps; but not a trifler of or with the truth.

15. To the extent desired, then, that is, within reasonable parameters of fairness, convenience, reason, expense and the ends of justice to all concerned, Comstock may pursue through the vehicle of permissible Discovery for the sake of preservation of evidence, oral or written "cross-examination" of Schultz to be completed within twenty (20) working days from the release of this action.

16. Following compliance with provisions of rule 1.318(e) (47 CFR 1.318(e)) upon receipt of the verified transcript, if oral, or verified written answers, the party or parties concerned may proffer, singly or hopefully jointly, that "cross-examination" for receipt in evidence. A further Order will issue in due course governing future disposition.

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ James F. Tierney
Deputy Chief Administrative Law Judge

FCC 88M-1942

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ
Sparks, Nevada

MM DOCKET NO. 83-1206
File No. BPH-820519AK

COMSTOCK BROADCASTERS,INC.
Sparks, Nevada

MM DOCKET NO. 83-1207
File No. BPH-820628AQ

For Construction Permit
for a New FM Station

ORDER

Issued: June 21, 1988 ; Released: June 22, 1988

At hand is a Petition for Leave to Amend, filed April 25, 1988 by Comstock Broadcaster, Inc., seeking to amend its application. No responsive pleadings appear to have been filed.

The amendment advises of a change in the official mailing address of Comstock and that Robert Carroll, Comstock's president and majority shareholder, has sold his ownership interest in Media Consultants and has formed his own advertising and public relations firm in Reno, Nevada, "Bob Carroll Advertising and Public Relations," effective April 1, 1988.

Good cause appearing, the Petition IS GRANTED and the amendment tendered therewith ACCEPTED.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ James F. Tierney
Deputy Chief Administrative Law Judge

FCC 88M-2012

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Issued: June 24, 1988 ; Released: June 28, 1988

1. At hand is a Motion to Enlarge Issues, filed May 23, 1988 by Pepper Schultz (Schultz), seeking the addition of issues against Comstock Broadcasters, Inc. (Comstock). Comstock filed its Opposition on June 10, 1988 and Schultz filed a Reply on June 22, 1988.

2. Schultz urges the addition against Comstock of the following issues:

(a) To determine whether Comstock Broadcasters, Inc., solicited an ex parte presentation in this proceeding and, if so, whether Comstock Broadcasters, Inc. is qualified to become a Commission licensee; and

(b) If it should be determined that Comstock Broadcasters, Inc. is not disqualified to become a Commission licensee, then to determine whether its present application should nevertheless be dismissed.

3. Schultz relates that the documents underlying the allegations in

support of the requested issues were received from the Commission's Managing Director and that there was no way prior of knowing that the improper solicitation had been made. Principally involved is a letter dated April 22, 1988 addressed to the Presiding Judge from United States Senator Chic Hecht of Nevada enclosing a copy of correspondence the Senator received from his constituent "Bob Carroll" (Carroll) a principal in the applicant Comstock Broadcasters, Inc. That letter from Carroll, in a word, requests "help" from the Senator's Office in this proceeding noting, among other matters, that having originally lost at the trial level but succeeded at an appellate level only to find "the [C]ommission has once again thrown the matter back to the original judge." The letter continues, relating the apparent reasons for the remand to the judge and discusses Carroll's notions of the "saturated" state of the radio market in the Sparks area and that Schultz's proposals of "pre-selling commercials impossible"; that "any inquiries the Senator's Office may be able to give the matter would be greatly appreciated by both Ben [Ben Akert - 49% shareholder of Comstock] and myself [Carroll]". That letter to the Senator was enclosed with the Senator's letter to the Presiding Judge. The Commission's Managing Director on May 17, 1988 forwarded a copy of Memorandum Opinion and Order, FCC 88M-1334, released May 4, 1988 giving the latest developments in the case to Senator Hecht and noted that under FCC Rule 47 CFR 1.1211(d) all parties to this proceeding were noticed and given disclosure of the Senator's letter and enclosure.

4. Schultz urges that the letter of the Senator to the Presiding Judge "itself constituted a presentation" under Rule 1.207, "since it clearly went well beyond a permissible status inquiry" noting that "[t]he letter commented adversely on Mr. Schultz by stating that he had 'applied for and was granted a license in 1974 or 1975 but never put the station on the air'"; that the Carroll letter to the Senator was enclosed which Carroll letter commented on the merits of this proceeding by asserting:

> "That it is Mr. Schultz's plan to 'run the station on a limited amount of capital by pre-selling commercial time, and by getting his friends to work free.'
>
> That the market is already 'over saturated,'
>
> That pre-selling is 'impossible,' and

> That there are stations in the market which are operating at a loss despite several years of operation."

5. Continuing, Schultz adds that this proceeding is a restricted one, Rule 1.1208(c)(2)(i), as well as an adjudicative one, Rule 1.202(d), and that none of the exemptions under Rule 1.104 apply; that the ex parte presentation made by Senator Hecht on behalf of Comstock principal Carroll was, therefore, prohibited.

6. Further, Schultz contends that the prohibited ex parte communication was solicited by Comstock's principal, Robert Carroll; that, among other improprieties, Carroll "asked Senator Hecht to use his elected office to 'help with a matter now pending before the Federal Communications Commission' and suggested reasons why Mr. Schultz's anticipated evidence at the remand hearing should be viewed as lacking in merit." Also, Schultz asserts "[i]t is evident that Mr. Carroll's April 18, 1988 letter to Senator Hecht was supplemented by other communications by or on behalf of Mr. Carroll, because the letter from Senator Hecht to [the] Deputy Chief Judge . . . contains information not set forth in Mr. Carroll's letter: In addition to the file number of the Schultz and Comstock applications, their Docket numbers and the name of the Presiding Administrative Law Judge, the letter from Senator Hecht notes that '[i]t is my understanding that Mr. Carroll's opposition in this application, Pepper Schultz, applied for and was granted a license back in 1974 or 1975, but never put the station on the air'"; that none of this information was contained in the April 18, 1988 letter from Mr. Carroll to Senator Hecht, thus, it is reasonable to assume, says Schultz, that Senator Hecht (or someone on his staff) and Mr. Carroll (or someone on his behalf) discussed the matter of the contemplated ex parte presentation at some length, demonstrating that the additional discussions goes to the severity of the violation." In sum, Carroll's solicitation of the Senator was violative of the Rules and amounts to a prohibited ex parte presentation, Schultz adds.

7. Concluding that substantial sanctions against Comstock are warranted, Schultz citing in support, Stearns County Broadcasting, Co., Inc., 60 RR 2d 846 (Rev. Bd. 1986), pointed argues that a prohibited ex parte presentation to the Presiding Administrative Law Judge here "is no less deplorable than one to the Chairman of the Commission, or, for that matter, to any other restricted Commission staff member." In Stearns County, the sole remaining applicant in an original comparative

FM proceeding apparently solicited prohibited ex parte presentations to the Chairman of the Commission; that while the record there appeared to lack "substantial evidence to prove that the culpable principal of Stearn County was sufficiently familiar with the ex parte rules, and then knowingly violated those rules" (Sterns County at 848), the proper remedy was found to be dismissal of the application rather than disqualification of the applicant. Schultz's two-pronged proposed issues seem fashioned to address that determination and buttresses his position, citing WKAT, Inc. v. FCC, 296 F.2d 375, 383 (D.C. Cir. 1961), cert. den. 368 U.S. 841.

8. In Opposition, Comstock, while admitting that its principal Carroll wrote the letter attached to Senator Hecht's letter disputes the contention that the Senator's letter constituted a prohibited ex parte presentation; that is, it expresses no view on the merits or outcome of the proceeding; does not suggest or require a resolution date; nor does it offer any specific reasons why resolution be expedited. Comstock observes that the letter, at most, referred to the Senator's understanding of Schultz's earlier construction permit but that he did not put the station on the air. Indeed, little more than a "status inquiry, pure and simple," unless, of course, says Comstock, if one, like Schultz in his Motion to Enlarge "engages in non-Aristotelian logic." (Poor Aristotle, the champion if not originator of empirical, practical or deductive reasoning rather than metaphysical, idealistic or inductive reasoning of his mentor Plato. Is Schultz's interpretation of the letter's content truly non-Aristotelian?)

9. Comstock's reasoning that the "merits" of the proceeding were not touched upon in Robert Carroll's letter because they related "matters of sworn testimony, in the form of affidavits and so on, thus "merely repeating" a matter of record, seems to do great injury to the practical attributes of Aristotelianism. That Carroll letter was made part of the Senator's letter as an enclosure; was not rejected; rather a document in support of the Senator's observation of Schultz's earlier alleged abandonment of a construction permit and comment on the impossibility in the "saturated" Sparks' radio market of "pre-selling" of advertising, among other observations related above in Schultz's arguments.

10. Next, Comstock, in seeming retreat, says that "even if the communication is deemed to be a prohibited ex parte presentation" and solicited by Comstock principal Robert Carroll, in a word, (1) Comstock did not intend to solicit an ex parte presentation and (2)

Comstock principal Robert Carroll was unaware of the existence of the ex parte rules (Opposition at p. 2). Even, putting to the side Comstock's readily available resource of these several years, competent and experienced counsel for advice and guidance, in the supposed arcane ways of this agency's Rules of Practice and Procedure, the Comstock principal Carroll can hardly be termed as unsophisticated in the ways, means and governance of the broadcasting business, faced with his self-described extensive broadcasting background and experience over the years 1954 - 1981, not only in radio but in television, in non-menial or non-subordinate position, "Producer" and "Operations Director," among others. what the lack of earlier attributes of "licensee" or "principal" in the broadcast station enterprise on the part of Robert Carroll, as Comstock relates, could possibly be taken to exonerate or to immunize his need for awareness of ex parte matters, in the face of his extensive executive broadcast experience in principal managerial positions, not to speak of his experience as an university lecturer in broadcasting and related topics, appears to defy accepted Aristotelian method. And this is not "silly" as Comstock would have it.

11. Perhaps the many or repeated ex parte solicitations in Stearns County were more in number than alleged here. The number here may be fewer, but surely no less egregious. And to say "There is no way Mr. Carroll can be found to have engaged in disqualifying conduct" if the allegations prove true, appears greatly to beg the question. Also, as to the notion of "intent"; generally, the design with which a person acts or being a state of mind rarely susceptible of direct proof, its appraisal must ordinarily be inferred from the facts, or if one will, the alleged facts, Cf. Witters v. United States, 106 F. 2d 837, 840; 70 App. D. C. 316; State v. Walker, 154 S.E. 866, 869 (albeit cases concerned with crime). Thus, under the postulates of lack of awareness or lack of intent concerning the Rules of concern here, Comstock does not fare well.

12. Comstock in a footnote, a kind of prolepsis, points out an obvious and self-evident fact of procedural life that Schultz "has the last say in his pleading cycle," but adds ought to explain the "categorically dissimilar facts" in Stearns County and here. This matter having its origin in 1982, that Carroll might have been "both distressed and depressed" and experiencing "frustration" in the long journey of the proceeding, may be the case; such may also be true and said of Schultz,

perhaps even this person or others. Yet, the prime mover, if not sole actor, giving rise to the alleged conduct at bar is exclusively the Comstock principal, Carroll. Thus, though this proceeding may be thought to be unduly protracted, if not interminable, the fault, if any, lies not at the trial level, but elsewhere; again, exclusively.

13. Schultz's Reply reasserts that "Comstock's arguments notwithstanding," a prohibited ex parte presentation has occurred and repeats seriatim the content incidents of the Senator's letter set forth in the instant Motion to Enlarge Issues; that the prohibited ex parte communication was solicited by Comstock principal, Robert Carroll; that Mr. Carroll's "desire to know what was going on, the best source of such information would have been Comstock's own attorney . . . who has participated in this proceeding since its inception." Further, that Comstock's position respecting no impropriety in seeking the Senator's help, being unaware of any regulatory limitation and associated conduct "are neither consistent nor credible". Finally, in restricted adjudicative proceedings, as here, citing again, WKAT, Inc. v. FCC., supra, what has occurred here is, prima facie, a serious violation of the Commission's Rules and warrants substantial sanctions against Comstock.

14. From the foregoing, it is clear and convincing that the necessary postulates attending the principal requested issue, prima facie, appear; that the allegations are sufficient in persuasion to suggest, indeed, compel, the need to test the efficacy of those allegations in the customary crucible of trial.

Accordingly, the Motion to Enlarge Issues must be AND IS HEREBY GRANTED and the issues in this proceeding are further enlarged, to wit:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited ex parte presentation in this proceeding and, if so, under the evidence adduced, whether Comstock Broadcasters, Inc. is qualified to become a Commission licensee.

The burden of proceeding with the introduction of evidence, the efforts developing the pertinent and relevant alleged facts having been uncovered by Schultz, IS ASSIGNED to Schultz. The burden of proof IS ASSIGNED to Comstock Broadcasters, Inc.

Because of the reach and seriousness of alleged facts under the added issue, unlike an earlier disposition relating to and comprehending the metes and bounds of so-called "Ashbacker Rights", the more formal attributes of trial, including the essential notion of demeanor, must govern hereafter. In that respect, and keeping in mind the matters outstanding following Commission's Remand, a further prehearing conference to consider and determine future procedural arrangements shall be convened at 9:30 a.m. on August 2, 1988, at 2000 L Street, N.W., Washington, D.C. in a courtroom to be later designated.

There is no need to ponder the proposed choice of disposition under the Schultz suggested issues; should the evidence adduced under the enlarged issue be fully sustained, to the necessary degree, the remedy would produce or suggest the same result.

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ James F.Tierney
Deputy Chief Administrative Law Judge

FCC 88M-2172

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

ORDER

Issued: July 8, 1988 ; Released: July 11, 1988

At hand is a Joint Motion filed July 5, 1988, by Pepper Schultz and Comstock Broadcasters, Inc., seeking receipt in evidence of the transcript of deposition of Pepper Schultz on May 17, 1988.

This Joint Motion accords with the guidelines set out in Memorandum Opinion and Order, FCC 88M-1334, released May 4, 1988, and, as such,warrants favorable disposition.

Accordingly, the Joint Motion may be AND IS HEREBY GRANTED, and the proffered verified Schultz deposition IS RECEIVED in evidence as Joint Exhibit 1; and, as requested, counsel are authorized to furnish copies to the Court Reporter. Obviously, only matters relevant to an issue or issues at bar will be deemed received in evidence.

Recent events occurring in this proceeding would suggest that the instant Joint Exhibit 1 and its proposed consideration and disposition be among the matters to be discussed at the further prehearing conference scheduled for August 2, 1988.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ James F. Tierney
Deputy Chief Administrative Law Judge

FCC 89D-10

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert, D. Miller Jr., Esq., on behalf of Pepper Schultz (Schultz); *David M. Hunsaker, Esq.*, on behalf of Comstock Broadcasters, Inc. (Comstock); and *Norman Goldstein, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

FURTHER SUPPLEMENTAL INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: March 6, 1989 ; Released: March 16, 1989

PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 88-85, released March 11, 1988, the Commission remanded the instant case to the Presiding Judge for further evidentiary hearing on the staffing and financial issues added against Schultz by the Review Board. In so remanding, the commission noted:

> The pleadings before us raise substantial and material questions of fact which relate to Schultz's qualifications to be licensee and, therefore, should be explored at an evidentiary hearing.

> First, we are troubled by the seeming discrepancy between Schultz's evidentiary showing, now before us, and the present record. For example, the Board in its remand order found that Schultz had not previously referred to using volunteers to run the station. 58 RR 2d at 437. Moreover, the [Judge's] findings in the supplemental initial decision seem to support Comstock's allegation that the proposal set forth in Schultz's submission is not his original plan, but one first formulated in an amendment rejected by the Board. *Pepper Schultz*, 103 FCC 2d at 1067-68. The present record provides no basis on which to resolve this dispute. Accordingly, a further hearing is necessary to decide this substantial and material question of fact. We also find a substantial and material question of fact as to whether the virtual one-man operating of Schultz's proposed commercial FM radio station can be effected. We therefore remand this proceeding for further hearings.

(*Remand Order*, Section 8,64 RR 2d at 1133).

2. Additionally, the Commission noted that discrepancies existed between the showings submitted by Schultz to the Commission and previous statements made by him in response to Comstock's Motion for Enlargement of Issues. The Commission noted further that Comstock had objected to some of the items shown on Schultz's balance sheet as being inconsistent with his prior deposition testimony. The Commission remanded the financial issue as well for further hearing.

3. In response to the Commission's *Remand Order*, a further conference was convened on March 22, 1988, and directed that the parties submit further showings addressing the concerns of the Commission (Tr. 264-265). In response Schultz submitted a "Submission in Response to Remand Order" on April 12, 1988, and Comstock responded thereafter with its "Response and Opposition to Schultz Remand Submission" on April 22, 1988.

4. By *Memorandum Opinion and Order* released May 4, 1988, (FCC 88M-1334), the Presiding Judge directed that Comstock may have further discovery in the form of written or oral cross-examination on Schultz's Remand Submission. Pursuant to that *Order*, Comstock noticed Schultz for oral deposition and conducted such deposition on May 17, 1988 The deposition of Schultz was thereafter proffered by the parties as "Joint Exhibit 1," and was subsequently received into

evidence by *Memorandum Opinion and Order*, FCC 88M-2172, released July 11, 1988.

5. By *Memorandum Opinion and Order*, FCC 88m-2012, released June 28, 1988, the following issue was added against Comstock:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited *ex parte* presentation in this proceeding, and if so, under the evidence adduced, whether Comstock Broadcasters, Inc. is qualified to become a Commission licensee.

Hearing was held on the added issue on November 15, 1988, and the parties directed to submit Proposed Findings of Fact and Conclusions of Law on that issue as well as on the Schultz deposition on or before January 13, 1989 (Tr. 481). Such Proposed Findings of Fact and Conclusions were timely filed as well as Reply Findings on January 13, 1989, and January 30, 1989, respectively, by the parties. Counsel on behalf of the Chief, Mass Media Bureau, as has been the custom in the recent past, in mainly comparative cases, did not actively participate in the Remand proceeding nor file Proposed Findings.

6. For the reasons hereinafter, this as a Further Supplemental Initial Decision, SHALL GRANT the application of Pepper Schultz.

FINDINGS OF FACT

The Original Staff Plan - (Schultz)

7. Prior to filing his application, Schultz estimated that for a real "top notch" radio station he would need 14 employees, whose salaries would total $180,000 (annually). He said he recognized that he could not afford to do this initially, but would have to wait until the money came in (Schultz Deposition Tr. 30-32).

8. Schultz was shown pages from his October 1981 application, and asked to verify that on Questions 31, of Section IV-A, he had entered zero "0" as the number of station employees (Schultz Deposition Ex. 4), and that on Questions 13 of Section IV-A (proposed total hours per week of operation) he had entered "168", which is twenty-four hours per day (Schultz Deposition Ex. 5). He confirmed that his original intention in 1982 was to operate the proposed radio station with no employees, and to automate the station (Schultz Deposition Tr. 12; 19-

20; Schultz Deposition Ex. 4). He confirmed that up through the hearing in March of 1984 it remained his intention to operate the station with no employees (Schultz Deposition Tr. 13, 21; Schultz Deposition Ex. 4; Tr. 44).

9. Schultz said that his plan was to reply on automation equipment and some sort of alarm system or answering device to operate the station. He was not counting on or thinking that he would use a friend, paid or unpaid (Schultz Deposition Tr. 25). He did not state that he intended to use automation in response to counsel's questions at the first hearing as to how he intended to do the announcing twenty-four hours a day (Schultz Deposition Tr. 51; Tr. 44; Schultz Deposition Ex. 3).

10. However, Schultz later stated that it had been his original intention to rely on help provided by friends at no charge (Schultz Deposition Tr. 24-25).

11. In Schultz Deposition Ex. 9, Schultz stated that ". . . several close friends from the Sparks area had promised their unpaid help in running the station during the first few months." He admitted that he had not asked anyone if they would volunteer some help. He said that he "felt" that people had offered help prior to his filing of the application, because over the years they have offered their encouragement to Schultz in his plans to construct an FM station in Sparks (Schultz 'Deposition Tr. 80-81). Schultz stated that "[a]ll through my proceedings, I felt that if ever needed help that I would go to some of my friends" (Schultz Deposition Tr. 25).

12. Schultz stated that a man named Frank Way had offered, years ago, to assist Schultz (Schultz Deposition Tr. 25). Schultz stated that Frank Way's offer to help to Schultz did not include an offer to help staff the station; rather, it was to help Schultz construct the station. Way was employed at the time by Grass Valley Group in California (Schultz Deposition Tr. 26-28). Moreover, Schultz said he had not intended to employ Mr. Way in constructing or staffing the station. He felt he could ask Mr. Way for advice in such construction if he needed to. It would have been to help Schultz "carry the transmitter up the stairs and manhandle it around" (Schultz Deposition Tr. 29-30).

13. Schultz could not remember when they had actually volunteer help (Schultz Deposition Tr. 25; 28). Other than David Timms, whom

Schultz said he felt must have offered his help prior to May 1982, Schultz could not say whether any of the people who have given affidavits in late 1984, had previously promised him before he filed his 1982 application, that they would help him staff the station. Schultz had not asked any of them, prior to filing his application, if he could rely on them if he needed help (Schultz Deposition Tr. 81-86).

14. Schultz himself made no provision for using his friends in staffing at the time he filed his application, because he felt that he would not need their help (Schultz Deposition Tr. 36-37).

15. The Commission's *Remand Order* expressed concern about Schultz's conflicting statements about when his friends had promised their help, Schultz did not go back to any of them to ask them if they remembered volunteering their help prior to May 1982, when Schultz filed his application (Schultz Deposition Tr. 87-88).

16. Schultz did not recall how he informed counsel that he had friends who could help him staff the station (Schultz Deposition Tr. 57). He wasn't sure when his counsel asked him how he intended to get around the ATS rules in operating the station without a staff. He thought it was during or after the Review Board's oral argument. "I just kind of sensed that I was going to be remanded." He said this was based upon the oral argument. He said he could not recall when the conversation occurred (Schultz Deposition Tr. 56-67; 58).

17. Schultz decided to change his staffing plans based upon opinions expressed by Review Board members during the oral argument. It was at that time that he went to his friends to see if they would help him staff the station, and to obtain affidavits (Schultz Deposition Tr. 40-41).

18. Schultz was aware of the ATS rules at the time he filed his application in May 1982, but that he was hopeful of getting a waiver or some sort of permission to operate the station without employees (Schultz Deposition Tr. 40). It was Schultz's intention to ask for waiver of the ATS rules *after* he received the construction permit. He was not sure whether that was legal or not (Schultz Deposition Tr. 42). He did not request waiver of the ATS rules at the time he submitted his application because he did not think he would be going through a hearing with a competing applicant (Schultz Deposition Tr. 42).

19. In planning his proposed operation with ATS, Schultz did not

write everything out as to what he needed. He had components and "stuff that I feel I can get by with" (Schultz Deposition Tr. 64). His objective in constructing the ATS system was to do it in the most economical fashion, although he had not made specific plans with Mr. Cairns to do it one way or the other. "I didn't spend too much time figuring out everything that I have to have on this ATS panel. And I felt that with my electronic ability, I would have built it or improvised it and got it together" (Schultz Deposition Tr. 68).

20. Schultz in prior testimony (Tr. 220-222) and earlier in the deposition was aware of the ATS rule (which required station employees, not independent contractors to monitor ATS operations), and that he would probably have to get a waiver. In his affidavit (Schultz Deposition Ex. 8, p. 5) submitted in opposition to Comstock's Motion for Enlargement of the Issues, he stated that he learned for the first time that the ATS rules wouldn't permit his proposed operation when his counsel told him after the first hearing (Schultz Deposition Tr. 52-53; 54; 95-97).

21. About when he became aware that the Commission's ATS rules would not permit his proposed one-man operation, Schultz said "I would have done what I could have done by the rules and regulations. And that is a hard one to answer" (Schultz Deposition Tr. 55).

22. Schultz was not sure whether his 1985 remand hearing testimony dealing with his plan to use an ATS system and the need for waiver concerned the requirement that prior FCC approval be obtained (or notice given) or about obtaining a waiver for the use of non-employees as monitors (Schultz Deposition Tr. 146-147). He was asked by his counsel if he had read any literature on ATS at the time he prepared and filed his May 1982 application which dealt with the questions of whether monitoring had to be performed by station employees, as distinguished from independent contractors. Schultz answered in the affirmative, and pointed out that some of the literature in front of him at the deposition stated that such monitoring needed to be performed by an employee who had a third class license (Schultz Deposition Tr. 144).

Financial Issue (Schultz)

23. Schultz has not submitted a list of estimates of costs that was contemporaneously prepared with his May 1982 application. He did not make any such list at the time he prepared and filed the 1982 application

(Schultz Deposition Tr. 111).

24. Schultz was shown three handwritten sheets (Schultz Deposition Ex. 12). He identified them as cost and budget estimates for his October 1981 application. This was prepared 7-8 months prior to the filing of his May 1982 application. The first page had a title at the top that said "Exhibit F" (Schultz Deposition Tr. 103). Schultz was also shown a copy of the financial portion of his October 1981 application (Schultz Deposition Ex. 13). He verified that the typed numbers of those pages corresponded, in general, to the handwritten pages (Schultz Deposition Ex. 12; Schultz Deposition Tr. 107-108).

25. Schultz said he didn't redo a financial proposal for his May 1982 application because the form no longer required it (Schultz Deposition Tr. 111-112). His October 1981 application as returned approximately a month before he resubmitted the May 1982 application (Schultz Deposition Tr. 16).

26. While he reevaluated his October 1981 financial proposal in preparing his May 1982 application (Schultz Deposition Tr. 15), he did not construct a new list of expenses and costs such as Schultz Deposition Ex. 12 or Schultz Deposition Ex. 13. He nevertheless, was keeping track of what he could and could not do (Schultz Deposition Tr. 15-16). "I looked at this [Schultz Deposition Ex. 13], and I gauged it, more or less, a mental thing" (Schultz Deposition Tr. 111). He could not be sure he did even that (Schultz Deposition Tr. 112).

27. After his October 1981 application was returned Schultz did not complete a new estimate of costs. He stated that he was aware of changes in costs by referring to Broadcasting Magazine and some books that he had (Schultz Deposition Tr. 17). By May 1982, some of the costs of equipment had gone up since he submitted his financial proposal in his October 1981 application. Some costs he said went down. The overall cost had gone up (Schultz Deposition Tr. 18-19).

28. The October 1981 application showed three-month operating costs (which included four-months of equipment lease payments and $1,000 in construction costs) of $9,140 (Schultz Deposition Ex. 12; 13). These costs included the following:

Rent ($250 per mo.)	$750
Electricity & Water	525
Telephone	75
Gas (auto)	250
Legal	0
Food	1300
Contingencies (Insurance)	800

(Schultz Deposition Ex. 13). In Attachment B to his Submission to the Genera! Counsel's Office and his Remand Showing, Schultz increased his estimate of utilities (water, electricity, telephone) to $1,500 (from $600), added an estimate for ATS monitoring which had not been previously included, added office supplies of $350, and reduced food and contingencies from $2,100 to $1,500. Nothing was added for legal or for auxiliary power.

29. Mr. Schultz believed that he would be able to leverage his available funds by firming up lease-purchase arrangement on new equipment, or by obtaining a loan secured by the equipment. Even though he had entered into no definitive agreements to either end, he had investigated the costs of new equipment and the availability of both types of financing and did not believe that he would be denied credit (Remand Submission, p. 4).

30. Schultz's estimate of rent for the transmitter site and the studio site was the rent he paid on his house. Originally intended to operate from his house (Schultz Deposition Tr. 135).

31. The increased sum of $1,500 for utilities (which included telephone and all power consumption) was arrived at by discussions between Schultz and his counsel, and was not made contemporaneously with the filing of his 1982 application. He did not know what he had gauged it against (Schultz Deposition Tr. 137).

32. Although not part of his original plan of financing, Schultz stated that he could have purchased certain used transmission equipment (in lieu of the leased equipment), listed as follows. As of May 19, 1982, the "bare bones" construction costs on "used equipment" are:

Transmitting equipment (used)	$5,950
Automation equipment (some new and some used, including ATS ATS equip)	4,000
Transmission line equipment (used)	400
Antenna equipment (used)	1,200
Misc. installation costs	1,000
	$12,550

33. For the $5,950 cost estimate for a used transmitter, Schultz believed he relied on a quote from Dean Speidel, dated July 7, 1981 (Schultz Deposition Ex. ll; Attachment G; Schultz Deposition Tr. 129). Schultz could not recall if he checked with Dean Speidel in May of 1982 before filing his application to see if the Rust used transmitter was still available (Schultz Deposition Tr. 130). In any event, Schultz acknowledged that he had not committed to Speidel to buy any equipment because he did not as yet have a construction permit, "and I wouldn't spend the money until I had the construction permit" (Schultz Deposition Tr. 130).

34. As noted earlier to better form the parameters of Schultz's staffing plans and their evaluation, during the first few months, Schultz intended to operate on a full twenty-four hour per day basis, with no paid employees, but with automated programming equipment and an automated transmission system and, to the least extent possible, with unpaid help from several friends. Schultz stated "[a]ll through my proceedings, I felt that if I ever needed help that I would go to some of my friends. And I--also had offers" (Joint Ex. No. 1, p. 25). Under this plan, employees of a local telephone answering service-burglar alarm company would have monitored transmitter instrument remotely during any absences from the station, and his friends would have been available to fill in when and to the limited extent, if at all, necessary. This remained his intention as of the time of his testimony at the hearing on March 27, 1984 (Remand Submission p. 9). Schultz also stated:

> My initial plan to operate on a twenty-four hour per day basis relied in good faith on the use of an automated transmission system, because I had read extensively about such systems and

> was convinced that one would work for me. That was my belief when I testified in 1984, and if I had been asked to explain how I intended to operate on a twenty-four hour per day basis with no employees, I would have explained it. (Statement of Pepper Schultz associated with his Remand Submission p. 2.)

35. Shortly after Schultz testified in 1984, it was pointed out by him by counsel that his ATS plan would not comply fully with Section 73.346 of the Rules, since employees of the burglar alarm service would not be his employees, as required. Schultz had not previously been aware of the requirement that ATS monitoring be accomplished by a station employee. He then abandoned his original intention to rely on both ATS equipment and on his originally intended automated program equipment and automated program equipment, in favor of a plan to rely on his originally intended automated program equipment and, to a greater extent than previously, upon unpaid volunteer helpers. His plan to make more extensive use of unpaid volunteer help was first presented to the Commission in an amendment filed with the Review Board on December 26, 1984. This was the amendment rejected by the board on an earlier appeal.

36. The original (1980) quotation for the ATS and automation equipment was $8,850 plus $3,000 labor cost (Schultz Deposition Tr. 73; Schultz Deposition Ex. 9). The costs associated with an ATS system amounted to $600, which included transmitter controls, and miscellaneous hardware to build a real time clock (Schultz Deposition Tr. 77).

37. The quotation on automation equipment listed in Schultz Deposition Ex. 10 (submission to General Counsel's Office, Attached A) dated September 2, 1980, was the same equipment that Schultz stated he relied on in estimating his costs of proposed operation for the 1982 application. Although he stated the price was revised downward in 1982, he could not find the letter from the supplier, and could not recall what the 1982 quotation consisted of (Schultz Deposition Tr. 72;73). This revised estimate of $4,000 for purchasing and installing ATS equipment was based upon a phone call with Robert Cairns. Cairns did not give him the $4,000 figures Schultz came up with that after having several discussions with Cairns (Schultz Deposition Tr. 133-134). Whether the $4,000 figure included Cairn's labor, which had originally been quoted at $3,000, is not known.

38. In his original financial proposal, Schultz was not contemplating purchasing used equipment to construct his station, but he could if ne needed to (Schultz Deposition Tr. 126-127). He was not intending to rely on used transmitting equipment in order to stay within his budget (Schultz Deposition Tr. 121; 125).

39. In his submission to the Gener l Counsel's Office and his Remand Submission, Schultz had the following current assets:

Cash on hand or in banks	$12,607
Gold and other rare coins	1,072
Federal Retirement Account	3,479
	$17,158

(Schultz Deposition Ex. ll, Attachment A; Schultz Deposition Tr. 113).

40. Schultz identified as a listing of funds on hand about the time he prepared his October 1981 application. The total was $13,259 (Schultz Deposition Tr. 103). Schultz's listing of funds available in the October 1981 application (but dated August 29, 1981) was $14,370 (Schultz Deposition Ex. 13; Schultz Deposition Tr. 108). In neither of those exhibits did Schultz list gold and rare coins or put a value on them. In his Statement in Response to Comstock's Motion for Enlargement of Issues, dated April 12, 1985 (Schultz Deposition Ex. 10), Schultz stated that at the time he filed his 1982 application he had "cash in hand" in excess of $14,000.

41. At the deposition, Schultz supplied bank statements from First Federal Savings of Nevada, dated 5/18/82 (Schultz Deposition Ex. 14), the Capital Preservation Fund, dated 12/31/82 (Schultz Deposition Ex. 15), and "Leave and Earnings Statement" for pay period ending 1/8/83) Schultz Deposition Ex. 16; Schultz Deposition Tr. 114-116).

42. Schultz stated that the Capital Preservation Fund was a money market account in which he had most of his savings. The amount of 12/31/82 was $10,529.76. The balance on April 7, 1982 was $11,443.39. The statement indicated that he withdrew $500 on May 20, 1982 (Schultz Deposition Tr. 117).

43. Schultz identified the First Federal Statement as his checking

account. As of May 18, 1982, the balance was $774 (Schultz Deposition Ex. 14; Schultz Deposition Tr. 116).

44. During 1982, Schultz had $54.32 deducted from his two-week salary for retirement. Cumulative retirement as of January 8, 1983 was $4,367.11. Subtract seven months of retirement contributions would have made the balance in May 1982 of around $3,479 (Schultz Deposition Ex. 16; Schultz Deposition Tr. 118-119).

Equipment Lease

45. Schultz's original financing plan included a lease-purchase of equipment in amount of approximately $40,000 (Schultz Deposition Tr. 121). He acknowledged that the equipment lease quotations totaling $40,000 which he had submitted in his statement to the Commission as documentation of that fact were dated after May 1982 (Schultz Deposition Tr. 123-124). As indicated in the equipment lease proposals, they did not constitute commitments to lease to Schultz on those terms, but were subject to favorable review of his credit by their credit committee. *See, e.g.* Schultz Remand Submission, Attachment D (Nevada National Leasing, August 30, 1982) p.2.

46. Schultz stated that he was going to pay for the ATS equipment on a lease-purchase, or apply for it on a lease purchase. The finance charge on the labor was 1.25% per month on the unpaid balance, and that Cairns, who was the supplier, had agreed to this (Schultz Deposition Tr. 72-73). No financial provision was made for ATS and automation equipment in his October 1981 application. There was the provision for the $40,000 equipment lease, which apparently did not include the automation equipment (Schultz Deposition Ex. 13).

The Comstock Ex Parte Issue

47. On april 18, 1988, Comstock principal Robert Carroll wrote the following letter to Senator Chic Hecht of the United States Senate:

> Dear Senator Hecht:
>
> I am writing to see if your office could be of any help with a matter now pending before the Federal Communications Commission. In 1982 I field for a new Sparks FM radio station allocation. The name of my corporation is Comstock Broadcaster. I hold 51% of the stock and Ben Akert holds

49%. Our opposition in this case is Pepper Schultz who resides in Sparks.

The original hearing Judge granted the application to Mr. Schultz. On appeal to the FCC Review Board, we raised some very serious questions as to his ability to own and operate a station. On two occasions the Review Board agreed without objections to his qualifications.

We were expecting to get a favorable ruling from the commission this year but now the commission has once again thrown the matter back to the original Judge. The reason was apparently to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time, and by getting his friends to work for free.

Senator, as you may or may not know this is an already over saturated radio market. Not only is the idea of pre-selling commercials impossible, but there are stations who have been on the air for several years still operating at a loss. We simply, after six years, would like to see where this action may be headed. Any inquiries [sic] your office may be able to give to this matter would be greatly appreciated by both Ben and myself.

If you stall should have any questions please tell them to give me a call. Thank you for your attention to this problem and Good Luck in your upcoming campaign.

Regards,

Bob Carroll

(Schultz Ex. 3, p. 2, Tr. 408).

48. In response to Mr. Carroll's letter, Senator Hecht's Reno Office sent the following letter to the Presiding Judge on April 22, 1988:

Dear Mr. Tierney:

Enclosed is a copy of the correspondence I received from Bob Carroll regarding his interest in determining the status of his application pending before the FCC for a new Sparks FM radio station allocation under the name of Comstock Broadcasters. Their docket number is 8301207, BPH-820628AQ, and they are in opposition in this case with Pepper Schultz, docket number 83-1207, BPH-820628AQ. I would appreciate any information you could provide regarding this matter.

It is my understanding that Mr. Carroll;s opposition in this application, Pepper Schultz, applied for and was granted a license back in 1974 or 1975, but never put the station on the air. Mr. Carroll further advises me that this case has been referred back to you by the Review Board. Please forward your reply, in duplicated to the attention of my Constituent Service Representative, Judy Duke, 300 Booth Street, Suite 2014, Reno, NV 89509. PLEASE REFER TO THE ABOVE NAME CONSTITUENT IN ALL CORRESPONDENCE REGARDING THIS MATTER.

Sincerely,

Chic Hecht

(Schultz Ex. 3, p. 1).

49. On May 17, 1988, Edward J. Minkel, Managing Director for the Commission, set the following letter to Senator Hecht in response to his inquiry of April 22, 1988:

Dear Senator Hecht:

Thank you for your letter of April 22, 1988, to Deputy Chief Administrative Law Judge Tierney, requesting information on the referenced proceeding and enclosing a letter from you constituent, Bob Carroll.

Your letter was forwarded to my office for reply in keeping with the Commission's *ex parte* rules dealing with written

communications relative to "restricted" proceedings under consideration by the Commission.

Administrative Law Judge Tierney released a Memorandum Opinion and Order (MO&O) in the proceeding of May 4, 1988. A copy of that MO&O is being provided to you with this letter. I believe that the MO&O will provide you with the information you requested.

In accordance with FCC rules as found in 47 CFR §1.1212(d), I am by copies of this letter, providing notice and disclosure of your communications to all parties to this proceeding. Additionally, this letter and your communication will be placed in public file associated with (but not made a part of) the record in the proceeding.

Your interest in this proceeding is appreciated. If I can be of further service to you in this regard, please feel free to call upon me.

Sincerely,

Edward J. Minkel
Managing Director

Enclosure

cc: Herbert D. Miller Esquire
David M. Hunsaker, Esquire

(Schultz Ex. 4, p. 1)

50. From those documents, the evidence reflect attendant circumstances. Following the remand of this proceeding, Messrs. Robert W. Carroll and William B. Akert, Comstock's two principals, discussed contacting "a Senator or Congressman about the case to see if anything could be done to expedite matters" (Comstock Ex. No. 7). Their discussion was precipitated by a report from Mr. Carroll to Mr. Akert concerning the remand. Mr Akert

became rather unhappy. I blew up a little. Told him that I was

> disgusted with the whole situation and that we'd been going for eight years and that I thought we should do something about it . . . I remember becoming very aggravated to the fact that this application is bogged down in bureaucracy. And it started out to be just a minor investment and it's developed into a capital investment. And we haven't stuck a stick in the ground. And I just blew up and I suggested--it was my suggestion that we contact the Senator or member of the Cabinet or somebody to see what the heck is happening to us (Tr. 354-355).

Despite his frustration and concern, Mr. Akert did not ask Mr. Carroll or Comstock's attorney,m Mr. Hunsaker, any questions about the procedural posture of the case or why it had been remanded (Tr. 358). He did, however, attempt to contact Senator Hecht's administrative assistant, Mr. Farr, himself (Tr. 376).

51. Akert stated that the purpose of the contact with Senator Hecht, which he had suggested (Tr. 355), had been "to see if anything could be done to expedite matters" (Comstock Ex. No. 7). He said "I was completely frustrated and I wanted the wheels of government to move a little faster, maybe" (Tr. 362). When asked "did you want the Senator or Congressman to try to do anything to push matters along?" He replied, "No, No. All I wanted was information" (Tr. 359). He was unable to identify any information, beyond that already in his possession, that he wanted (Tr. 359). He was, however, doubtful of Mr. Carroll and of Comstock's counsel (Tr. 360) and concerned that Comstock should perhaps be proceeding differently than it had been up to that point. He wanted to know whether "another avenue" should be taken by the company (Tr. 361) or whether he should terminate the project by withdrawing his financial backing (Tr. 361).

52. Carroll also related:

> I was very distressed, as well as depressed, to learn that the case was not yet over, and that it was likely to go on for at least another year, since either party would be expected to appeal an adverse decision from the Judge. It was inconceivable to me that the Commission could not have made a final ruling one way or the other on the question of Schultz's qualifications.
>
> When my counsel advised that Judge Tierney had ordered that

> additional written pleadings be submitted, I could not understand why this could not have been done at the Commission level, and the whole matter resolved there, rather than being remanded. I began to wonder if the case would ever be over, and whether such a procedure as was being followed was out of line. I felt that, perhaps the Senator's Office might be able to provide me with information that neither I, nor my counsel, were aware of (Comstock Ex. No. 6, p. 1).

53. Following his consultation with Akert, Carroll telephoned William Farr, who was the head of U.S. Senator Chic Hecht's Reno Office, "and asked him if anything could be done to expedite matters" (Comstock Ex. 6). Farr, who had known Carroll socially for several years told Carroll:

> . . . that we would make an inquiry on his behalf and see what could be done to expedite a resolution of the proceeding, but that it would be necessary for him to send us a letter for us to proceed. He said that he would do so. (Joint Ex. No. 2, p. 2).

54. On April 18, 1988, Carroll discussed the status of the proceeding with counsel, Hunsaker (Tr. 419-420). He did not seek the prior advise of counsel concerning his anticipated contact with Senator Hecht's Office (Tr. 419); nor did he inquire of counsel whether specific information would be useful or should be sought via Senator Hecht (Tr. 405-406). He also stated that he knew of no specific information which might be obtained via Senator Hecht which "neither I, nor my counsel, were aware of" (Tr. 404). When asked "[d]id you believe that a Senator would be able to get information on the proceeding that was not available to your attorney?" he responded "I might have believed that, or his staff or something" (Tr. 404-405).

55. Following his conversation with Farr, and on the same day that he spoke with counsel (Tr. 402), Carroll wrote a letter to Senator Hecht, set out above at para. 47.

56. Carroll attempted to point out the merits of Comstock's case and the lack of merit of Schultz's because

> I think we wanted to point up that we thought we had a very

> solid case . . . I felt I needed to point that out, what our good points were, you know instead of just writing a letter and saying please look into this matter . . .[W]e raised what I thought were some very serious questions about Mr. Schultz's ability to own and operate the station. . .I think I needed to give the Senator some background so that there would be come [sic] credence to that letter in his mind . . I thought this was maybe our only chance to get a letter into the Senators office and I probably needed to background everything that I felt was important to our case (Tr. 447-449).[1]

57. When Carroll's letter arrived, Farr asked his assistant, Ms. Judy Duke, to handle the matter and suggested that she call Carroll to get the name and address of the person at the FCC who was in in charge of the matter, so that she could write a letter to that person (Joint Ex. No. 2, p. 2). She did so (Joint Ex. No. 3, p. 1).

58. According to Carroll, he did not "anticipate that ... [Senator Hecht] or his Staff would write directly to Judge Tierney or attach my letter to his own" (Comstock Ex. No. 6). However, on cross-examination he acknowledged that it would have been equally true to say that he did not anticipate that the Senator or his staff would not do so: "I didn't know what they would do; sure. I had no idea what they would do." And, he did not ask (Tr. 451). He had no idea how, without consulting the Judge, the Senator would be able to get information on when the Judge was likely to rule (Tr. 453).

> I had no idea. I know that Washington works in strange ways and I'm not privy to all the information that goes on here (Tr. 453).

Nor did he have any idea why Ms. Duke would want to know the name of the Presiding Administrative Law Judge unless she intended to

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[1] Mr. Carroll had previously suggested that he had easy access to Senator Hecht:

> Mr. Miller, if I wanted to solicit Chic Hecht's help, I would have gone in and seen Chic Hecht on a one to one basis. I would not have written a letter to his administrative assistant. And I'd of said, Senator Hecht, we need some help with this. We want to bring this thing to an end. Please do whatever you can do (Tr. 413).

communicate with him (Tr. 458).

59. During the re-direct examination of Carroll, the following exchange occurred:

> Q. Do you recall whether Ms. Duke specifically, said to you when she was asking for, information, 'who should I send this to; or, words to that effect?"
>
> A. I believe she did; yeah.
>
> Q. Okay, Was your response, Judge Tierney
>
> A. Yeah.
>
> Q. Send what to?
>
> A. In the inquiry or whatever they were working, on (Tr. 465)[2]..,

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[2] Evidently unsatisfied with these responses, Comstock's counsel tried again:

> Q. Refer to her statement. You see where she says find out information and who I should send it to?
>
> A. Un-huh
>
> Q. Now, do you--I'll ask you to think again. Do you recall whether she asked you that question--"who should I send this to?"
>
> A. I'm not sure she asked me who she--it seems to me, Mr. Hunsaker, that she said is Judge Tierney the Judge?
>
> Q. So it sounded as if she already knew the information?
>
> A. Yeah, I'm sure that that's right (Tr. 465-466).

Latter, on examination by the Presiding Administrative Law Judge, Mr. Carroll stated:

> I just--that had never even occurred to me that you

(continued...)

60. During his conversation with Ms. Duke, Carroll mentioned that Schultz had previously been granted a permit to build a station in Sparks, but that he had not built it, Ms. Duke

> thought this information might have some significance, since there seemed to be no reason for the FCC to grant another permit to someone
>
> who in the past had been granted one but had not built the station (Joint Ex. No. 3, p. 2).

61. Following the standard practice in her office, Ms. Duke prepared a letter and signed it for Senator Hecht, who was not personally involved. Their practice was to enclose a copy of constituent correspondence, and accordingly, a copy of Carroll's letter to Senator Hecht was enclosed with Senator Hecht's letter. Ms. Duke assumed that Carroll was aware of this practice (Joint Ex. No. 3, p. 2).

62. According to the stipulated testimony of Ms. Duke:

> Our office routinely makes inquiries to government agencies on behalf of the Senator's constituents. In particular, we often write to Administrative Law Judges in the Social Security Administration who are reviewing constituent's claims for Social Security benefits. In these circumstances, we do not regard it as improper or as a violation of the separation of powers to present information given to us by our constituents which we feel may be helpful to their cases. In preparing the letter to Deputy Chief Administrative Law Judge Tierney, I assumed that the situation was similar to my experience with the Social Security Administration judges, and it did not occur to me that this was a contested proceeding or that our letter and informational presentation might be improper (Joint Ex. No. 3).

63. In an earlier affidavit in this proceeding, Carroll had stated:

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[2](...continued)

would be contacted. That never occurred to me, *You just don't do those things*. (Tr. 475) (emphasis added)

> Had it been my intention to attempt to influence the outcome of the proceeding, I would certainly not have waited until now to make such attempt, nor would I simple have asked the Senator to make an inquiry on my behalf (Tr. 414).

He opined on cross-examination at the time he solicited Senator Hecht's help that he did not believe it would have been improper to have done just that:

> Q. Your answer is then that you didn't think it was wrong--you didn't think it would have been wrong to ask Senator Hecht to come visit the Chairman of the Federal Communications Commission and demand that your application be granted?
>
> A. I guess that thought was in my mind at the time, that that would not be wrong, but I didn't ask that.
>
> Q. That that would not be wrong?
>
> A. Right (Tr. 416).

64. However, he stated that he believed it would have been wrong for him to have asked the Senator to call the Judge about the case (Tr. 452-453) and that if he had understood it to be Ms. Duke's intention to write a letter to the Presiding Administrative Law Judge, he would at least have questioned the propriety of doing so (Tr. 458-459). In this connection, Carroll knew that such a communication would have been improper, because he occasionally has coffee with a federal judge, who declines to discuss cases that are before him (Tr. 459), and that he has known since "in my old news days when I covered court proceedings and things" (Tr. 467) that it is not right to ask judges about cases they are hearing (Tr. 466-467).

65. On May 8, 1988 (twenty days following the April 18 call to Mr. Hunsaker and letter to Senator Hecht's Office, and sixteen days following the April 22, 1988 letter from Senator Hecht to Carroll (Joint Ex. No. 3), advising that "I have already been in touch with the FCC on your behalf ..."), Carroll and Akert participated in a telephone conversation with Comstock's counsel, Mr. Hunsaker (Tr. 374-375). A David Newman, who is not a principal of Comstock but is a friend

of Messrs. Carroll and Akert, and who had earlier advised Carroll that it "couldn't hurt" to ask Senator Hecht for help (Comstock Remand Ex. No. 6, para. 3), also participated in the May 8th telephone conversation (Tr. 365-383). Akert was certain that he knew by that time that Carroll had written his letter to Senator Hecht (Tr. 387), and he "thought that it was good that the letter was written and in fact, I was fairly well impressed that Senator Hecht acted as fast as he did; that he'd got started" (Tr. 338). Although he did not believe that the subject of the letter had come up during the May 8th conversation (Tr. 376), Akert could think of no reason why it would not have come up, and that for all he knew, it could have (Tr. 381). His only specific recollection was of having questioned Mr. Hunsaker "as to why it was taking so long; why it was dragging" (Tr. 382) and of having expressed his frustration to Mr. Hunsaker (Tr. 382).

66. Carroll stated that the subject of his letter to Senator Hecht did not come up during the May 8, 1988 telephone conversation because it was not important enough (Tr. 410), and because "I thought that it might be an affront to him professionally that I had written a letter to somebody else to see what the status of the proceeding was" (Tr. 410).

67. In addition to the May 8, 1988 telephone conversations in which Messrs. Carroll, Akert and Newman participated, Carroll had telephone conversations with counsel, Mr. Hunsaker, about this proceeding on the following dates:

March 17, 1988
April 1, 1988
April 18, 1988
April 22, 1988
May 11, 1988 (Tr. 422-423).

Carroll stated that during none of these conversations with counsel was any mention whatever made of any communication with any elected representative (Tr. 423).

ULTIMATE FINDINGS AND CONCLUSIONS

Financial Qualifications and Staffing (Schultz)

68. The *Remand Order*, on this issue affecting Schultz, set the

parameters of inquiry: (a) whether his original financial plan was viable; (b) whether his :"virtual one-man operation" could be effectuated; (c) whether material discrepancies between his August 7, 1987 submission and the record exist and, if so, their consequences; and (d) whether the adequacy of Schultz's financial and staffing plans lend support to the previously made findings of good cause for acceptance of his 1975 financial and staffing plans. Nothing which has been earlier and clearly decided in this seeming epic-like trilogy, needs be revisited, albeit, that the notion of *stare decisis* may not be controlling here.[3]

69. Consistently through out the various stages in this proceeding, Comstock has characterized Schultz's financial and staffing proposals as "dissembling, misrepresentation, naivete or lack of touch with reality." What, then, does the record evidence on *Remand* suggest or reasonably infer?

70. In his original financial plans in 1982, Schultz had an amount of $17,158 available comprehending assets in cash, in banks, precious metals and a recoverable federal retirement contribution; in addition his other assets, including an automobile, broadcast equipment, programming materials and office furniture amounted to $31,542. His original planned operating expenses were $4,450; he calculated that by acquiring additional used equipment needed to put his station on the air amounted to $42,550; thus a total cost of planned construction of $16,980 *versus* $17,158 available. Comstock argues that the majority of Schultz's assets are "non-liquid"; that only with supporting documentation of current liquidity, Comstock says is lacking, can such assets be accepted, citing *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 (1978) and others; that he has "double-counted" his "other assets" to the extend of $10,500 of his claimed $31,542 "net liquid assets"; indeed, adds Comstock, that his automobile, broadcast equipment, programming materials and office furniture, totaling $10,500 cannot be realistically "cashed out" in order to pay for (or lease) the additional equipment, materials and operating expense items be still needed under his 1982 proposal. He would then "have only $21,042, not $35,542,"

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[3] *Cf.* The doctrine of *stare decisis* is not generally applicable to the decisions of administrative tribunals. *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 383, 385, 174, F.2d 38, 40 (*Policy Statement on Comparative Broadcast Proceedings*, 1 FCC 2d 393, fn. 2 (1965).

adds Comstock.

71. The argument of Comstock at first glance, appears plausible, at least to the extent that the sum of $21,042 not $35,542 as net liquid assets was available at the outset to Schultz. Whether this is accurate and thus permits the somewhat quantum leap proposed by Comstock that this condition "more than justified the Review Board in refusing to accept a post-designation financial amendment proffered three years after Schultz filed his application" is yet to be addressed under the evidence.

72. At the 1982 filing of his application, Schultz planned the use of an automated transmission system (ATS) to be controlled remotely at a local burglar alarm company during any periods he was personally absent from his station; that to the extent he needed further assistance, to ask friends to provide whatever help he might need to staff the station, but he abandoned such plans because the Commission's Rules extant required such monitoring be done by station employees not contract personnel. Such Rules, Schultz argues, have since changed and Schultz's original proposal "would have been entirely consistent with them." Without the ATS, Schultz filed a proposed amendment to utilize the help of "Friends" in December 1987, a matter later rejected by the Review Board.

73. A chronology of Schultz's staffing plans besides claiming to be able to operate on a "seventy-two hour per week schedule," Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding, in response to changing conditions. It has gone from slight reliance to the minimum extent necessary on help from "friends" at the beginning, to substantial reliance on unpaid friends later, to no significant reliance on unpaid friends in his most recent financial and staffing amendment (Schultz Proposed Findings p. 29, para 12).

74. On the matter of volunteer help which was cited in the *Remand Order*, Schultz says that "he had always intended *some* reliance on volunteer help" and had he been asked to explain his intended "Twenty-four hour per day basis" with no employees he would have explained it; but, he was not asked, noting that on counsel's advise he would not volunteer unasked information; this relating to his testimony in 1984. (Yet, this and the most recent evidence do not disclose his counsel's

asking such helpful information, for example on direct or redirect examination.) Indeed, his explanation of the "discrepancy" is "adequate and convincing." Schultz adds. On this it is footnoted "[i]n retrospect" Schultz's counsel "should have explored the matter" on redirect examination (Schultz Proposed Findings p. 31, fn 22).

75. Again, Schultz reverts to a matter apparently considered and decided at appellate levels, the amendment he submitted in 1985 on the establishment of his financial and staffing qualifications, a matter, he repeats, "which was unopposed" and adds "[i]f that amendment was, after all, properly accepted then Mr. Schultz is now financially and in every other respect qualified" (Schultz Proposed Findings p. 1, para. 16). If that matter properly may be revisited, that, too, as yet is to be addressed.

76. In sum, then, in the absence of acceptance of his 1985 amendment, under the evidence addressed to Schultz's original financial and staffing plans, there, remains an applicant whose operational plans for his proposed station are marginal in realistic accomplishment. While the "double counting" characterization by Comstock will be passed over concerning Schultz, such things as his automobile and office furniture, it would seem in this sometimes Never Never Land of comparative choice, even the modest treasure of "Piggy banks" might be unearthed to achieve passing minimal merit in financial qualification; thus, the original 1982 financial posture of $31,542 comprehending also the minimum needed for three months operation and no employee salaries for that period is found to be that sum $31,542. His proposed leasing arrangements, though not firmly committed, would otherwise be available to a successful applicant. *Armando Garcia,* 64 RR 2d 1005 (Rev. Bd. 1988).

77. The other vital matter addressed in the *Remand Order* is co-extensive with Schultz's financial viability, that is, his proposed staffing plans. His proposed ATS monitoring plan, without station employees, would have been at great odds with the then governing Rules, he did abandon that plan, and decided to rely on "friends." Also, his proposed original plan "to operate on a twenty-four hour basis" daily except Sunday, with prodigious efforts, might be achievable when translated into the requirements of Rule 73.1740 mandating a *weekly* schedule of seventy-two hours. This condition, of course, ignores the common frailties of human nature, among which are unpredictable bouts with

illness and other human burdens. Yet, and not without supposed predilection or pre-disposition in anyone's favor, Schultz's staffing, as originally conceived, ATS having been abandoned (quite properly) would also be marginal in its achievement, teetering, but no wholly unreasonable. One needs but recall the disposition in *Bisbee Broadcasters, Inc., et. al.*, 48 FCC 2d 291 (Rev. B. 1974), where among other matters, it is observed:

> First, the Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff. Secondly, while Wrye's staffing proposal might be frugal, rigorous and demanding, the Board, in its expertise, does not believe that it is so far below the average of small market stations, sometimes referred to as 'mom and pop' stations, that it must be rejected as incapable of effectuation ... at 292-293.

78. Here, an unmarried rigorous and fairly youthful Schultz, there a heavily occupied husband and equally occupied housewife and mother of two children, one a handicapped child; here Schultz with the help of "friends" there with part-time student employees. Though not entirely analogous, Schultz, too, would be capable at the outset to meet a "rigorous and demanding schedule."

79. Accepting that Schultz's plan, undermines the public interest, argues Comstock; indeed, that "no plan at all" will be sufficient henceforth in matters of financial and staffing should Schultz's proposal be deemed qualified; such a proposition "should be rejected, vehemently, here and now." *Coastal Bend Television, Inc.*, 54 RR 2d 367, 371 (Rev. Bd. 1982), Comstock concludes that neither *Azalea (Azalea Corp.*, 31 FCC 2d 561 (1971), nor *Crosthwait (Crosthwait* v. *FCC.* 584 F2d. 550 (D.C. Cir. 1978), permits the Commission to snub proposed curative amendments, such as those Schultz's amendments, when the fundamentals of "good cause" are absent.

80. But the mission here is to test and apprise the "adequacy" of Schultz's 1982 financial and staffing plans and if so, under the evidence, whether that test lends support to the previously made findings of good cause for acceptance of his 1985 financial and staffing plan. They have been found *adequate*, albeit barely so; and it is so concluded. With that

premise, even though at the outset of his filing in 1982, being a supposed kind of classic in naivete, perhaps prompted (erroneously) by the absence of challenge in the *Hearing Designation Order (HDO),* (MM 83-662, released November 10, 1983, and that *HDO's* acceptance as qualified (para. 17)). Schultz remained fully comfortable in his quest; as the time in this long journey progressed and with the later engagement of experienced communications counsel, that inert condition was attacked, particularly by his challenger at bar, Comstock, and then he got about getting his house in better order not as Comstock would have it in *1982*, but alerted and spurred by that Comstock challenge in the months following the *HDO* in November 1983, with the scheduled hearing date, January 12, 1984, later changed to January 13, 1984 and again to March 27, 1984. Thus it would appear from that chronology, the Schultz 1985 amendments cannot, in fact, be characterized as "three years late"; perhaps a little over a year.

Ex Parte Issue (Comstock)

81. The earlier findings here would permit, more compel, the conclusion that the letter written to the Presiding Judge by Senator Hecht constituted a prohibited *ex parte* presentation. Such letter not only could not be classified, as Comstock would have it, a simple "status inquiry," but much more and went to the very merits of a matter actively *sub judice.* Further, the letter enclosed copy of a letter Comstock's principal, Carroll, seeking the Senator's "help" in comstock's "solid case" and added "there were some very serious questions about Mr. Schultz's ability to own and operate a station." Akert, also a Comstock principal, albeit a described "passive investor" (49%), was the prime mover in contacting the Senator. Akert was doubtful, perhaps distrustful, of the efficacy of Carroll and Comstock's counsel in getting greater results and "wanted the wheels of government to move a little faster, maybe." He did not seek the "information" he claimed he needed from either his co-principal Carroll or Comstock's counsel, who, particularly counsel, could have provided the information he supposedly needed.

82. Also carroll, the other Comstock principal, exclaimed his frustration at the remand of this proceeding and that he, like Akert, sought to have this proceeding expedited and telephoned to Senator's assistant, Farr, asking him "if anything could be done to expedite matters." Carroll is also the one who identified the person to whom the

Senator's letter should be sent, upon inquiry by an assistant to the Senator, Ms. Duke, that is, the person who would rule on the proceeding. He did relate, at trial, that he did not anticipate that the Senator would write directly to the Judge, "[y]ou just don't do those things." He also stated when he initiated the contact he had no idea that any contact would be "wrong" but, on reflection, he would have questioned its propriety. Indeed, Carroll, referring to his earlier days as a reporter, that it is not proper to ask judges about cases they are hearing. Also the evidence reveals that neither Comstock's other principal nor Comstock's counsel was asked whether congressional intervention should be sought nor was it advised by either; that it had occurred despite the fact that counsel and Carroll spoke on the telephone about the status of the proceeding the very day, April 18, 1988, Carroll send his letter to the Senator's Office.

83. Schultz poses the notion, in his Proposed Findings, that Carroll "knew or at least was very concerned that it had been wrong to seek congressional intervention, did not want to be so advised by counsel, lest he then be forced to bring that intervention to an end prematurely before it produced the desired results . . ."; that Comstock's "alleged ignorance of the *ex parte* rules . . . rings exceeding hollow," noting, particularly, "Carroll's substantial experience in broadcasting" an experience self-described by Carroll. Though this Schultz thesis and inference are his, they are not off-target and belie, in great measure, Carroll's suggested "ignorance" of the existence of the *ex parte* rules, a person with admitted broadcast experience but, Comstock would have it, more familiar with the FCC Rules in "Part 73, not Part 1."

84. At some length, Comstock argues, that "even when a prohibited *ex parte* presentation has occurred, no sanction will be imposed where there is no evidence of intent to violate the rules or to influence the Commission by surreptitious means." citing *Black Hills Video Corp.*. 6 RR 2d 289 (1965) and other. Indeed, in a moment of complete candor, a kind of open admission -- and a kind of *quantum* reverse defensive somersault--that even if a prohibited *ex parte* presentation occurred here; "the conduct in question is but a single, isolated instance" (Comstock Proposed findings at para. 131, p. 51).

85. Schultz submits that having had the burden of proof under the *ex parte* issue. Comstock has failed in that burden and noting that "[a]ll violations of the *ex parte* rules, are serious, since they potentially affect

the adjudicative process"; that the sanction here, unlike in cases cited by Comstock, should not simply be dismissal without prejudice of the Comstock application, but rather "the dismissal with prejudice of Comstock's application with attendant findings of lack of qualification premised on "adverse candor findings" underlying the inconsistencies in the testimonial evidence of Comstock's principals.

86. In stressing the importance of prohibited *ex parte* matters, the Court in *WKAT, Inc.* v. *FCC*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied* 368 U.S. 841, stated:

> This doctrine applies to adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with the basic principles of our jurisdiction, eat at the very heart of our system of government -- due process, fair play open proceedings, unbiased, uninfluenced decision. He who engages in such efforts before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding (at 383).

87. Comstock pointedly argues no "intent" on the part of its principals to violate the *ex parte* rules. Really? In its most accepted, even in its most prosaic sense, "intent" connotes, "design, resolve or determination with which a person acts"; *Witters* v. *United States*, 106 F. 2d 837,840 (70 App. D. C. 316 (*albeit* in a criminal matter)), "being a state of mind, is rarely susceptible of direct proof but must ordinarily be inferred from the facts." *State* v. *Walker*, 154 S.E. 866, 867. And "intent" is a purpose to use particular means to effect a certain result. Both Comstock principals, Akert and Carroll, by their conduct using the otherwise innocent agency of a Senator's Office, sought to influence this adjudicatory forum, not by permissible status inquiry, but by surreptitious efforts to have the supposed power of that Office impermissible intervene by pointing out the merits of their case and the flaws of their opponent Schultz; a matter directed at the very heart of an ongoing adjudicatory proceeding. Surely, conduct, not isolated, in the nature of events in the remote past, but fully active on going events at the very times the very prohibited conduct took place in April and May 1988. Conduct which flies in the face of even warm reason, born, perhaps, of frustration, maybe anger, yet human emotions hardly the

antidote for wanton mischief. As such, mitigation to any discernible degree is totally wanting; the "isolated instance" suggested, a subversion of either reason or even compassion. Comstock has, by its conduct, consciously flouted even the modest prerequisites for eligibility not inordinately difficult but expected qualifications as a prospective licensee of high public trust; hence, it is compelling that its application be denied.

88. Where does the evidence leave Schultz under the *Remand Order* ? In his proposed Reply findings Schultz suggests that the Commission's recent disposition in *Memorandum Opinion and Order* in *Opal Chadwell,* FCC 89-7, released January 31, 1989[4] affirmatively supports his thesis that he may properly rely on his 1985 financial and staffing amendments, a matter which did not gain approval of the Review Board but was particularly alluded to by the Commission in its *Remand Order*.[5] There, after noting Schultz's submission to the General Counsel, the Commission stated: "Schultz contends that his submission demonstrates that his original,unamended staffing and financial proposals were viable" (*Remand Order* at para. 5). And later after reviewing the staffing and financial proposals, the Commission added: "We find the pleadings before us raise substantial and material questions as to Schultz's financial plan. As in the case of Schultz's staffing proposal, we are troubled by the seeming discrepancy between his present showing and the existing record . . . " (*Remand Order* at para. 11). Respecting the reliability of Schultz's listing of costs and funds reflected in the balance--not previously submitted--the Commission adds that Comstock should be given the opportunity to test those figures. That Comstock has done by noting, among other objections, that the *Remand Order* does not relate to Schultz's post-designation amendments but solely whether Schultz's "unamended proposals" were to be found adequate; not whether "Schultz has demonstrated good cause for amending out of his problems. That is not an issue and the question is

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[4] Addressed by Schultz in greater detail in "Memorandum of Law" of February 7, 1989. This, Schultz relates, is due to the fact that only an earlier News Release reflected the Commission's action.

[5] Schultz filed Motion for Leave to File Memorandum of Law on February 7, 1989; because it faithfully reflects Commission action and serves the ends of justice in a fuller explication of current Admission disposition in a apposite matter, the Motion IS GRANTED and the accompanying "Memorandum of Law" ACCEPTED.

not properly before this forum", adds Comstock (Comstock Reply Findings at pp. 11-12). Comstock's Response[6] to Schultz's invocation of *Opal Chadwell* argues: "As usual Schultz does not tell the whole story,"; that if "he wishes to have the benefits of the *Chadwell* case, thus, have the question of good cause for his February 1986 amendments reconsidered, he must take the bad with the good," i.e. suffer the imposition of a "lack of candor issue" earlier suggested by the Review Board. 103 FCC 2d 105 (FCC 86R-2, released January 24, 1986), para. 13, n. 9; para. 3, n. 4. This, not to mention says Comstock, "Schultz may not rely on non-liquid assets without relevant appraisal."

89. Comstock's Response fails in persuasion on at least two counts. First, this forum finds and has found, whatever the imperfections of his proposals, Schultz as found *infra,* under the evidence, has taken no undue liberties with truth; rather, perhaps naive, no prevaricator; his opponents have been found greatly less than forthright. Hence, the necessary premise to "lack of candor" is, at best, amorphous. Secondly, his original staffing and financing plans, too, have been found adequate, viable and reasonable capable of effectuation. At this hour were the question of "candor" to be posited, it would not affect Schultz but others. With the disposition here, and to gratefully forgo the seeming infinity of this epic, that route shall be mercifully avoided.

90. Earlier, it has been found that under his original financial proposal Schultz had available in combined assets the sum of $31,542; a financial proposal consisting of $17,158 in current assets, miscellaneous assets and other assets with total projected costs of construction of $16,980. His projected leasing arrangements for broadcast equipment, even though contingency subject to suppliers credit approval, were predicted on reasonably achievable leasing costs of $6,422 for three months operation and initial operating expenses of $4,430 amount to a total of $10,852 suggesting a surplus of some $6,306 over the $17,158 in current assets. Thus, it has been found that the Schultz original financing plan was adequate, and, in that sense, viable.

91. A harder look at his original staffing plan, a "virtual one-man

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[6] Comstock filed a Response on February 16, 1989, which, too, has been fully considered.

operation" also must be assayed under the evidence. Though his original plan was to operate on a twenty-four hour per day basis with ATS, a proposal later abandoned, taking into account his good health and youth, he could have "even without the help of anyone" operate his proposed station on a seventy-two per week basis, required under governing Rules. Austere, possibly heroic, no doubt, but humanly impossible, not.

92. A note at this point on the observed demeanor of Comstock's principals, Akert and Carroll as well as Schultz, during the Remand hearing. Unlike Schultz's less urbane person characterized at time by Comstock as "naive" and a "dreamer," among others. Akert and Carroll, the Comstock principals, are of a greatly different sophistication than Schultz. Both, though described by Comstock as "lay persons" who acted out of "ignorance," are experienced business persons, one of whom, Carroll has had intimate and extensive broadcast experience over the years 1954 - 1981 in both radio and television and in such leading positions as "News Director," and a university lecturer, among others, in broadcast related subjects. Hardly a "lay person" when it comes to the field of broadcast enterprise; and who by virtue of that experience can find little refuge in the sanctuary of "ignorance". Akert, indeed, in response to inquiry at trial the reasons for contacting the Senator" was questioning Bob Carroll's credibility, my counsel's credibility and the bureaucracy itself . . . "; and posited the notion that what else is a Senator there for "if he isn't here to help his constituency." And Comstock admits that "had Comstock's counsel been consulted in timely fashion, we would not be litigating this issue" (Comstock Proposed Findings p. 17, para. 37).

93. Yet, neither Comstock principal recanted, with no expression of chagrin, regret or remorse but professed self-assurance of propriety and total innocence. Indeed, addressing Schultz's charge of intent to solicit a prohibited *ex parte* presentation, Comstock borrowing a page from the Spanish Inquisition,[7] and not unlike its earlier misapplication of Aristotelian method of reasoning, likens Schultz to the Grand

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[7] Historians generally accept the Spanish Inquisition as the reorganized version of the "Inquisition" or "Holy Office" being instituted in the 15th Century--1478--under the Spanish Sovereigns; the "Inquisition" or "Holy Office" being established in the 13th Century--1200's.

Inquisitor's methods "of rooting out heresy and witchcraft"; hoping "that our present system of constitutional justice has arrived at a slightly higher plane of logic and civilization." Without the "rack" or other barbarous torture employed by anyone, Comstock's undoing here is totally self-inflicted by the disclosure in the evidence of its calculated intent to have the eminent office of an outside party openly and improperly intrude in an ongoing adjudicatory proceeding.

94. Thus, Schultz somewhat the dreamer, perhaps more than a bit naive in the genesis of his plans for a broadcasting station there in Sparks, Nevada was, nevertheless through this long journey, ever forthright, responsive and truthful, enduring long periods of repeated indepth cross-examination. Messrs. Carroll and Akert, both declining to seek "information" on the status of the proceeding from the most likely source, their counsel, throughout this protracted case, chose, instead contacting the Senator's Office, were greatly less than candid and forthright choosing, rather than acknowledging "the obvious fact that a prohibited *ex parte* presentation has occurred," to affirmatively deny any such thing took place, this despite other conduct in evidence Carroll's admission at hearing, among others, that in his letter to the Senator he attempted to point out the merits of the Comstock case and the flaws in Schultz's taking into account Comstock's admitted wrong doing as, at most, "an isolated instance," this is trifling with the truth and reprehensible.

95. As found earlier, the time frame between the setting of the original contested issue here in the *HDO, supra,* released November 18, 1983, the Initial Decision of July 30, 1984 (FCC 84D-49), and the filing of Schultz rejected 1985 amendments is not that remote which might otherwise undermine a principal criteria of "good cause" affecting post-designation amendments, that is, timeliness. *Cf. Alvin Communications Corp., supra;* the other principal criteria would not be affected here; the great duration of this proceeding culminating in the Commission's *Remand Order* would be dispositive of the other governing criteria. *See Azeala Corp., supra.*

96. It has also been found that his *original* financial and staffing plans of *1982* though minimal and austere, indeed requiring Herculean personal efforts to meet minimum weekly broadcast hours, nevertheless, however barely so, were adequate. That perhaps bare adequacy provides, in light of the maturation of Schultz's better grasp and

understanding of the need for greater viability of his proposals, the necessary premise of whether good cause exists for permitting amendments of those proposals as posited in the *Remand Order*. Those 1985 Schultz amendments provide better assurance of the viability of his proposals and, thus, suggest their revisit and acceptance.

97. In sum, finding Schultz's original financial and staffing proposals of 1982 adequate; buttressed by the more assuring 1985 amendments, there is no remaining doubt to question the efficacy of Schultz's proposals; hence it is again concluded that Schultz is fully qualified to be a Commission licensee. And under the other earlier found comparative considerations affecting Schultz, not at issue here, Schultz, the evidence compels, must be the prevailing applicant.

98. This is assuredly so, whatever the marginal nature, as some would have it, of the adequacy of Schultz's original staffing and financial proposals; that adequacy has been raised under the convincing evidence here, to fully assuring; on the other hand, the evidence at bar under the *ex parte issue* convincingly and completely undermines the efficacy of the Comstock application, compelling denial. For, in this mind, an incipient marginal applicant, were that so, is far better than an unfit one.

Accordingly, the application of Pepper Schultz for the captioned facilities at Sparks, Nevada, may be AND IS HEREBY GRANTED; that being so, the application of Comstock Broadcasters, Inc. for those same facilities must be AND IS HEREBY DENIED.[8]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

James F. Tierney
Deputy Chief Administrative Law Judge

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[8] In the event exceptions are not filed within 30 days after the release of this Further Supplemental Initial Decision and the Commission does not review the case on its own motion, this Further Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

FCC 89R-53

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ
Sparks, Nevada

MM DOCKET NO. 83-1206
File No. BPH-820519AK

COMSTOCK BROADCASTERS,INC.
Sparks, Nevada

MM DOCKET NO. 83-1207
File No. BPH-820628AQ

For Construction Permit
for a New FM Station

Appearances

Herbert D. Miller, Jr., on behalf of Pepper Schultz; and *David m. Hunsaker*, on behalf of Comstock Broadcasters Inc.

Decision

Adopted: August 7, 1989 ; Released: August 17, 1989

By the Review Board; MARINO (Chairman) and BLUMENTHAL; Board Member ESBENSEN not participating.

Board Member BLUMENTHAL:

1. The Board has before it the *Further Supplemental Initial Decision*,4 FCC Rcd 2386 (1989) (hereinafter *FSID*) of Deputy Chief Administrative Law Judge James F. Tierney (hereinafter ALJ) in the above-captioned comparative broadcast licensing proceeding. Also before the Board are exceptions to the *FSID* filed by Comstock, and a reply thereto filed by Schultz. Oral argument was heard on July 21,

1989.[1]

BACKGROUND

2. This case, the latest segment of what the ALJ aptly termed an "epic-like trilogy", *FSID* at para. 68, has been before the Board on two prior occasions: *First*, four-and-a-half years ago (January 28, 1985 to be exact) the Board remanded this comparative broadcast licensing contest to the presiding ALJ to determine (a) whether Pepper Schultz, with a proposed staff of *"zero"* employees, could effectuate his application proposal to operate a full service commercial broadcast station all by himself for 24 hours per day, 168 hours per week, for several months until (according to Schultz counsel) "the money started rolling in"; and, (b) whether Schultz was, therefore, financially qualified to be a licensee. *Pepper Schultz*, 58 RR 2d 434 (Rev. Bd. 1985) (hereinafter *Board Remand Order*). And, *second*, one year later (January 24, 1986 to be exact), when after a supplemental evidentiary hearing on the two aforecited issues, the Board found that Schultz had failed to meet his burdens of proof on the two issues or demonstrated "good cause" to amend his application, and accordingly concluded that Schultz was not basically qualified to a grant of a broadcast Construction Permit. *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986) (hereinafter *Board Decision*).

3. By way of further brief reprise, our 1985 *Board Remand Order* noted that the ALJ's initial findings and conclusions reflected that:

> Schultz for an indefinite initial period, would be the sole employee and operator of the station: he would do all of the announcing, sell all of the commercials, do all of the engineering, billing, etc. until such time as the station had a cash flow sufficient to hire personnel. He stated he has given no thought to what personnel he might hire at that time.

58 RR 2d at 435 (quoting *Initial Decision).* Finding that Schultz's proposal to operate the station 24 hours per day, 168 hours per week,

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[1] Counsel for Comstock did not appear at oral argument, claiming a scheduling conflict. Counsel for Schultz did appear and argue on Schultz's behalf.

performing all of the myriad engineering, business, sales and on-air functions, with "*zero*" employees appeared "inherently incredible." *id.*, at 438, the Board, "[a]t risk of some derision" *(id.)*, sent the case back to the ALJ on the aforementioned staffing and financial issues to assure Schultz his full administrative due process. Moreover, and importantly, the Board noted the fact that shortly after the initial oral argument before the Board, and:

> . . .on December 26, 1984, Schultz filed a Motion for Leave to Amend to reflect that Schultz intends "to rely on an automated transmission system (ATS) and on help provided without charge by friends to permit his proposed station to operate twenty-four hours per day with no 'employees.". . . Putting aside for the moment precisely *what* Schultz seeks to "amend," the motion will be denied. Post-hearing designation amendments are governed by 47 CFR §73.3522(b), and an amendment will not be accepted unless it meets all six of the "good cause" elements set out in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 [18 RR 2d 820] (Rev. Bd. 1970). Schultz's Motion does not show "good cause"; in general, it simply asserts that "Mr. Schultz has given considerable additional thought to his proposal, and has concluded that the slight modifications made in the attached amendments are necessary.". . . It seems Schultz now concedes that his original proposal would shortly grind Pepper down with a workload not to be sneezed at.

Id., at 437 N. 6 (internal citations omitted). The Board thereby made it clear that the supplemental hearing ordered therein was to be upon the efficacy of Schultz's *original* application proposals, unless all six prongs of the "good cause" amendment test had been satisfied.

4. Notwithstanding that specific caveat, our 1986 *Board Decision*, issued after completion of the first remand hearing, and upon exceptions to the *Supplemental Initial Decision*, 103 FCC 2d 1066 (ALJ 1985), found that the ALJ had permitted Schultz to blithely abandon his initial application proposals, and to freely amend his application without any reference whatsoever to the mandatory "good cause" amendment test set forth in §73.3522(b) of the Commission's Rules. Rather, the ALJ

opined:

> Yet, though Schultz's earlier notion to operate his proposed station with no employees suggested Herculean commitment, this side of realism, given further and sober thought, albeit afterthought, he did amend his application to propose a more enlightening staffing proposal. (*See Memorandum Opinion and Order*, FCC 85M-1599, released April 12, 1985, para. 7.) That amendment was unopposed and was accepted under governing law with the *caveat* of no comparative advantage.
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> The Schultz latest staffing proposal of a full-time staff of five (three announcers, a secretary and himself) and a part-time staff of six (all announcers) for the type of facilities here appears reasonable. To say this, no enhancement is endowed to Schultz under abiding comparative canons. Simply stated, his first proposal smacked of seeming naivete' faced with the customary demands of a start-up operation of an FM station.

Id., at 1073. Honoring "Schultz's corrective response in his amendment" (*id.*), the ALJ excused Schultz's original and patently incredible staffing proposal by observing: "Had Schultz been denied his quest to amend, his whole standing may have been fatally imperiled." *Id.*, at 1074. With no greater justification, Schultz was permitted to amend his original financial proposal. *See id.*, at 1074-1077.[2]

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[2] Schultz's amended financial proposal relied upon an alleged 1985 "gift" of $101,000 from Schultz's brother and sister-in-law, about which the ALJ wrote:

> Whatever the nature of the origins and metamorphoses from loan to unqualified gift from a sibling donor, the $101,000 appears unqualifiedly available and also appears fully adequate to underpin his financial qualifications with a sizeable cushion of approximately $22,000.

Supplemental Initial Decision, 103 FCC 2d at 1077. The Board, however, (continued...)

5. Upon review, we held the ALJ's acceptance of Schultz's three-year late amendments to be, in essence, "plain error," especially since our *Board Remand Order* had specifically rejected Schultz's post-oral argument staffing amendment, and despite our admonition that no new staffing proposal would be accepted in the absence of "good cause" showing. *Board Decision*, 103 FCC 2d at 1054-1058. To the same effect was out view of Schultz's 1985 financial amendment. Even assuming, *arguendo*, the permissibility of Schultz's late amendments, we found improbable, to say the least, Schultz' portened operating modality, to wit:

> Schultz's staff will be required to work in a studio space of [3]00 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188) Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101°-102°. (Tr. 190). He does not intend to hire any sales staff or news personnel. *Id.* Schultz proposes to do all of the sales for the station himself. (TR. 195-196).
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> Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether

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[2](...continued)

found this last-minute gift to be dubious, at best, and held that a hearing as to its legitimacy would be required before it could be credited. *Board Decision*, 103 FCC 2d at 1060-1061 & n.9. The full Commission explicitly agreed with that assessment, *see Comm'n Decision, supra* para. 6.

> they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206) Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on hand, and does not plan to purchase initially any cartridge or "cart" record/playback.

Id., at 1064 n.14 (quoting *Supplemental Initial Decision).* As to Schultz's original staffing proposal, we noted Schultz's declaration that:

> [w]hile I had originally intended to hire no employees during the initial period of operation, and to rely on help provided by friends at no charge, I have changed my plans and not intend to hire . . . employees.

Id., at 1055 (quoting Schultz Exh. 2 at 4). But, we recalled:

> When he filed his application on May 19, 1982, and until December 26, 1984, Schultz repeatedly insisted that he would operate the proposed station completely by himself during the initial three-month period. *S. I. D.*, para. 5; *I. D.*, Concls. para. 6. Schultz indicated that he would have no money for hiring employees for a period of several months "when the money started rolling in" *Remand Order* at n. 4; *see also id.*, at n.3 (quoting hearing transcript of Schultz testimony). He apparently had a hazy idea that, buy using studio automation equipment and an automatic transmission system, he could somehow operate the station for several months as a total one-man show, *24 hours per day*, with no human assistance of any kind. *Id.;* Tr. 43-49, 220. That is, Schultz testified that he intended to personally operate the station, including the performance of all the necessary announcing, engineering, sales, news, programming, business functions, *etc., I.D.*, Concls., para. 6, with *no* staff whatever. At oral argument held December 12, 1984, we made apparent our skepticism over Schultz's patently incredible staffing proposal. *See* Tr. of Oral Arg. at 119 *et seq.* Realizing, then, that a remand on

> a staffing issue was legally unavoidable, Schultz hastily filed a motion for leave to amend his application to substitute an entirely new staffing proposal, therein specifying reliance "on an automated transmission system (ATS) and on help provided without charge by friends [six acquaintances] to permit his proposed station to operate twenty-four hours per day with no employees." *See Remand Order,* at n. 6. We there denied Schultz's motion because he wholly failed to demonstrate "good cause" for the amendment in accordance with the tenets of 47 CRF § 73.3522, *see id., and we remanded the case,* inter alia, on a staffing issue because Schultz's operational plans in this regard were, on their face, incapable of effectuation. *Remand Order* at paras. 4-5 & n.8 (citing *KOWL, Inc.*, 49 FCC 2d 962, 966 (Rev. Bd. 1974), and *Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703,708 (Rev. Bd. 1975)). In remanding, we admonished that no new staffing proposals should be proffered; instead, the remand hearing was simply to provide Schultz with a due process opportunity to demonstrate, if possible, how his facially absurd proposal could be effectuated.

Id., at 1054-1055 (emphasis in original; footnote omitted). And we concluded:

> Most critically, Schultz's failure to take reasonable steps to timely develop a *bona fide* staffing proposal has grossly delayed this proceeding. As was made abundantly clear in *Adjudicatory Re-Regulation*, 58 FCC 2d 865,871 (1976), the broadcast application process is not a "paint-by-numbers" exercise, in which applicants fill in their proposals, even as they proceed through comparative hearings -- and beyond. Such a process is inconceivable, and Schultz's post-hearting dabbling with his application is the antithesis of the fair, orderly process established by the Commission . . . . Further, because he utterly failed to satisfy four of the six criteria of the Commission's test for "good cause", Schultz's 1985 motion for leave to amend should have been denied. Having filed his application in May 1982,

> it should not have taken Schultz nearly 3 years to appreciate that a around-the-clock radio operation would need some minimum semblance of a staff. His insistence throughout the comparative hearing that he alone would perform all of the myriad functions of an ongoing broadcast station -- with neither sleep nor surcease -- constituted irrefragable evidence that Schultz was either distantly out of touch with reality or singularly qualified for the laurel of "FCC Fabulist of the Decade."

Id., at 1057. Observing that Schultz's 1982 application was, on the face of it, inherently incredible, we called on the Commission's application processing staff for "more active scrutiny at the earliest application review stage," *id.*, at 1063, denied Schultz's application, and granted the competing application of Comstock.

6. Upon Schultz's application for review of the 1986 *Board Decision*, the full Commission squarely affirmed on both the staffing and financial issues. *Pepper Schultz*, 2 FCC Rcd 1476 (1987) (hereinafter *Comm'n Decision).* It further agreed emphatically that Schultz should not have been permitted to amend his original application "in a situation like this where good cause for acceptance of the amendment was patently lacking in the evidence [and] review of the ALJ's action was appropriate." *Id.* Ratifying the Board's finding of "plain error" in the ALJ's actions, the Commission explained (*id.*):

> In the instant case we agree that a notable lack of good cause precludes acceptance of the amendments. As the Board notes, the record indicates that Schultz had lacked diligence in formulating his initial staffing and financial proposals. Under these circumstances there are no equities justifying Schultz's being permitted to moot questions concerning his lack of qualifications by means of a last minute curative amendment. We find Schultz's financial proposal particularly troublesome because Schultz certified in his application that he was in compliance with the Commission's financial requirements. Contrary to the conclusions of the ALJ, we agree with the Review Board that further hearings would be required to explore the *bona fides* of Schultz's

> representations in light of the record developed concerning Schultz's proposals. This factor further militates against a find of good cause.

7. The five-year odyssey of the Schultz/Comstock vessel appeared to have finally terminated, until -- by *Order*, FCC 87I-065, released June 29, 1987 -- the Commission's Office of General Counsel invited Schultz to supplement the record on his *original* staffing and financial proposals (*id.*; footnote omitted):

> Although the present record contains considerable evidence regarding Schultz's original staffing and financial proposals, it appears desirable to ascertain what additional evidentiary showing Schultz believes he could have made if there had been an evidentiary hearing on his original staffing and financial proposals, in order to determine whether a remand is warranted. Thus, Schultz will be given the opportunity to submit to the Commission a statement indicating what further showing could be made as to the sufficiency of those proposals. He should submit affidavits or declarations containing the substance of any testimony he would have introduced and should attach copies of any proposed exhibits. He may also include an explanatory pleading of no more than ten pages. Comstock will have the opportunity to file a response of no more than ten pages.

8. Schultz filed his supplementary material; but, by *Memorandum Opinion and Order*, 3 FCC Rcd 1200 (1988) (hereinafter *Comm'n Remand Order*), the Commission returned the proceeding to the ALJ, for a third time, for a further supplemental initial decision on both the original staffing and financial issues. As to staffing, the Commission stated (*id.*, at 1201):

> The pleadings before us raise substantial and material questions of fact which relate to Schultz's qualifications to be [a] licensee and, therefore, should be explored at an evidentiary hearing. First, we are troubled by the seeming discrepancy between Schultz's evidentiary showing, now before us, and the present record. For

> example, the Board in its remand order found that Schultz had not previously referred to using volunteers to run the station. 58 RR 2d at 437. Moreover, the ALJ's findings in the supplemental initial decision seem to support Comstock's allegation that that proposal set forth in Schultz's submission is not his original plan, but one first formulated in an amendment reject by the Board. *Pepper Schultz*; 103 FCC 2d at 1067-68. The present record provides no basis on which to resolve this dispute. Accordingly, a further hearing is necessary to decide this substantial and material question of fact. We also find a substantial and material question of fact as to whether the virtual one-man operation of Schultz's proposed commercial FM radio station can be effected. We therefore remand this proceeding for further hearings.

As to finances, it declared (*id.*):

> We find that the pleadings before us raise substantial and material questions as to Schultz's financial plan. As in the case of Schultz's staffing proposal, we are troubled by the seeming discrepancy between his present showing and the existing record.

9. With suitable alacrity, the ALJ organized the process for the second remand hearing, directing that Schultz submit to discovery by Comstock on the issues. Shortly thereafter, however, attention was stolen away from Schultz, and toward Comstock, in the wake of a letter of April 22, 1988 from U.S. Senator Chic Hecht directed to the presiding ALJ.[3]

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[3] The full text of Senator Hecht's letter to Deputy Chief Administrative Law Judge James F. Tierney (reprinted in *FSID* at para. 48) reads as follows:

> Dear Mr. Tierney:
>
> Enclosed is a copy of the correspondence I received from Bob Carroll regarding his interest in determining the status of his application pending before the FCC for a new Sparks FM radio station allocation under the name
>
> (continued...)

Senator Hecht's letter referred to the ALJ a missive of April 18, 1988 to the Senator from Bob Carroll, the controlling owner (51%) of Comstock, in which missive Carroll related to the Senator the status of his application, criticized Schultz's competing proposal, complained that "after six years, [Comstock] would like to see where this action may be headed." advised that "[a]ny inquiries your office may be able to give this matter would be greatly appreciated." and closed by inviting the Senator's staff to call Carroll with any questions.[4] Pursuant to the

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[3](...continued)

of Comstock Broadcasters. Their docket number is 83-1207, BPH-820628AQ, and they are in opposition in this case with Pepper Schultz, docket number 83-1207, BPH-820628AQ [sic]. I would appreciate any information you could provide regarding this matter.

It is my understanding that Mr. Carroll;s opposition in this application, Pepper Schultz, applied for and was granted a license back in 1974 or 1975, but never put the station on the air. Mr. Carroll further advises me that this case has been referred back to you by the Review Board. Please forward your reply, in duplicate to the attention of my Constituent Service Representative, Judy Duke, 300 Booth Street, Suite 2014, Reno, NV 89509. Please refer to the above name constituent in all correspondence regarding this matter.

Sincerely,

Chic Hecht

[4] The full text of Bob Carroll's letter to Senator Hecht (reprinted in *FSID* at para. 47) reads as follows:

Dear Senator Hecht:

I am writing to see if your office could be of any help with a matter now pending before the Federal Communications Commission. In 1982 I filed for a new Sparks FM radio station allocation. The name of my corporation is Comstock Broadcasters. I hold 51% of the stock and Ben Akert holds 49%. Our opposition in this case is Pepper Schultz who resides in Sparks.

The original hearing Judge granted the application to Mr. Schultz. On appeal to the FCC Review Board, we raised some very serious questions as to his ability to own and operate a station. On two occasions the Review Board agreed with our objections to his qualifications.

We were expecting to get a favorable ruling from the commission this year

(continued...)

Commission's *ex parte* procedures,the Senator's correspondence was deflected to the Commission's Managing Director, who responded politely to the Senator.[5] In light of the Senator's unusual letter to him,

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[4](...continued)

but now the commission has once again thrown the matter back to the original Judge. The reason was apparently to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time, and by getting his friends to work for free.

Senator, as you may or may not know this is an already over saturated radio market. Not only is the idea of pre-selling commercials impossible, but there are stations who have been on the air for several years still operating at a loss. We simply, after six years, would like to see where this action may be headed. Any inquiries [sic] your office may be able to give to this matter would be greatly appreciated by both Ben and myself.

If you staff should have any questions please tell them to give me a call. Thank you for your attention to this problem and Good Luck in your upcoming campaign.

Regards,

Bob Carroll

[5] The full text of the FCC Managing Director's letter to Senator Hecht (reprinted in *FSID* at para. 40) reads as follows:

Dear Senator Hecht:

Thank you for your letter of April 22, 1988, to Deputy Chief Administrative Law Judge Tierney, requesting information on the referenced proceeding and enclosing a letter from you constituent, Bob Carroll.

Your letter was forwarded to my office for reply in keeping with the Commission's *ex parte* rules dealing with written communications relative to "restricted" proceedings under consideration by the Commission.

Administrative Law Judge Tierney released a Memorandum Opinion and Order (MO&O) in the proceeding of May 4, 1988. A copy of that MO&O is being provided to you with this letter. I believe that the MO&O will provide you with the information you requested.

(continued...)

the ALJ, by *Memorandum Opinion and Order*, FCC 88m-2012, released June 28, 1988, added against Comstock a hearing issue:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited *ex parte* presentation in this proceeding, and if so,m under the evidence adduced whether Comstock Broadcasters, Inc. is qualified to become a Commission license.

A further supplemental evidentiary hearing on the staffing and financial issues against Schultz, as well as on the *ex parte* solicitation issue against Comstock, was held in the waning months of 1988.

FURTHER SUPPLEMENTAL REMAND HEARING

Schultz Staffing Issue

10. The ALJ took evidence on Schultz's staffing plans, and his findings of fact are narrated in paras. 7-22 of the *FSID*. Schultz has filed no exceptions to those findings, nor challenged them in any way. The salient ALJ findings are these (1) Section IV-A of Schultz's application (FCC Form 301) specified that Schultz proposed to operate

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[5](...continued)

In accordance with FCC rules as found in 47 CFR §1.1212(d), I am by copies of this letter, providing notice and disclosure of your communications to all parties to this proceeding. Additionally, this letter and your communication will be placed in public file associated with (but not made a part of) the record in the proceeding.

Your interest in this proceeding is appreciated. If I can be of further service to you in this regard, please feel free to call upon me.

Sincerely,

Edward J. Minkel
Managing Director

Enclosure

cc: Herbert D. Miller Esquire
David M. Hunsaker, Esquire

24 hours per day, 168 hours per week, using "zero" employees[6], (2) Schultz "was not counting on or thinking that he would use a friend, paid or unpaid" to assist in this virtuoso endeavor, but rather "Schultz said that his plan was to rely on automation equipment and some sort of alarm system or answering device to operate the station" unassisted[7]; (3) however, "Schultz later stated that it had been his original intention to rely on help provided by friends at no charge."[8] that "several close friends from the Sparks area had promised their unpaid help."[9] but that "he had not asked anyone if they would volunteer some help."[10]and that "Schultz did not recall how he informed counsel that he had friends who could help him staff the station,"[11] though he "felt" all through the proceeding that "if [I] ever needed help that I would go to some of my friends"[12]; (4) Schultz claimed "that a man named Frank Way had offered, years ago, to assist Schultz,"[13] but Way's offer was for help in constructing the station and "did not include an offer to help staff the station"[14]; (5) that[15]:

> Schultz decided to change his staffing plans based upon opinions expressed by Review Board members during the [1984] oral argument. It was at that time that he went to his friends to see if they would help him staff the station, and to obtain affidavits (Schultz Deposition Tr. 40-41);

(6) while Schultz had speculated that he could operate solo for the first several months by using an automated transmitter system (ATS), the Commission's Rules at that time flatly prohibited such an unattended operation,[16] but Schultz asked for no waiver of the ATS rules with his

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[6] *FSID* at para. 8

[7] *Id.*, at para. 9

[8] *Id.*, at para. 10

[9] *Id.*, at para. 11

[10] *Id.*; *see also id.*, at para 13 ("Schultz had not asked any [volunteers], prior to filing his application, if he could rely on them if he needed help.").

[11] *Id.*, at para. 16

[12] *Id.*, at para. 11.

[13] *Id.*, at para. 12.

[14] *Id.*, It is not clear whether Way's possible help was to be confined to "advice in such construction" (*see id.*)

[15] *Id.*, at para. 17

[16] *Id.*, at para. 18

application "because he did not think he would be going through a hearing with a competing applicant."[17] though he was "hopeful": to get an ATS rule waiver "after" he received the Construction Permit, not knowing whether such a maneuver would be "legal"[18]; (7) "Schultz did not write everything out as to what he needed" for his ATS vision.[19] "didn't spend too much time figuring out everything that I have to have on this ATS panel,"[20] but "felt" he "would have built it or improvised it and got it together"[21]; (8) however[22]:

> About when he became aware that the Commission's ATS rules would not permit his proposed one-man operation, Schultz said "I would have done what I could have done by the rules and regulations. And that is a hard one to answer" (Schultz Deposition Tr. 55).

11. In his conclusions of law, the ALJ resolved that whereas Schultz's:

> proposed ATS monitoring plan, without station employees, would have been at great odds, with the then governing Rules, he did abandon that plan and decided to rely on "friends". Also, his proposed original plan "to operate on a twenty-four hour basis" daily except Sunday, with prodigious efforts, might be achievable when translated into the requirements of Rule 73.1740 mandating a *weekly* schedule of seventy-two hours. This condition, of course, ignores the common frailties of human nature, among which are unpredictable bouts with illness and other human burdens. Yet, and not without supposed predilection or pre-disposition in any one's favor. Schultz's staffing, as originally conceived, ATS having been abandoned (quite properly), would also be marginal in its achievement, teetering, but not wholly unreasonable.

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[17] *Id.*
[18] *Id.*
[19] *Id.*, at para. 19
[20] *Id.*
[21] *Id.*
[22] *Id.*, at para. 21

FSID at para. 77 (emphasis in original). Earlier, the ALJ considered that:

> Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding, in response to changing conditions. It has gone from slight reliance to the minimum extend necessary on help from "friends" at the beginning, to substantial reliance on unpaid friends later, to no significant reliance on unpaid friends in his most recent financial and staffing amendment (Schultz Proposed Findings p. 29, para. 12).

Id., at para. 73. In the final analysis, the ALJ observed (*id.*, at para. 80; emphasis in original):

> But the mission here is to text and appraise the "adequacy" of Schultz's 1982 financial and staffing plans and, if so, under the evidence, whether that test lends support to the previously made findings of good cause for acceptance of his 1985 financial and staffing plan. They have been found *adequate*, albeit barely so; and it is so concluded. With that premise, even though at the outset of his filing in 1982, being a supposed kind of classic in naivete, perhaps prompted (erroneously) by the absence of challenge in the *Hearing Designation Order (HDO)*, (MM83-662, released November 10, 1983, and that *HDO's* acceptance as qualified (para.17)), Schultz remained fully comfortable in his quest: as the time in this long journey progressed and with the later engagement of experienced communications counsel, that inert condition was attacked, particularly by his challenger at bar, Comstock, and then he got about getting his house in better order, not as Comstock would have it in *1982*, but alerted and spurred by that Comstock challenge in the months following the *HDO* in November 1983, with the scheduled hearing date January 12, 1984, later changed to January 13, 1984 and again to March 27, 1984.

12. *Exceptions.* In its exceptions to the *FSID*, Comstock complains that the ALJ erred, again, by permitting Schultz to amend his original staffing proposal and to reduce his proposed hours of operation from 168 hours per week to, possibly, 72 hours per week nearly three years

after Schultz's filing of his application.[23] Comstock also faults the ALJ for his refusal to add lack of candor issue against Schultz for his perceived contradictions on two key points: (1) whether Schultz contemplated the use of "volunteers" prior to the filing of his application, or not until after the Review Board's first oral argument in late 1984[24]; and, (2) whether Schultz knew his ATS scheme (albeit gauzy) was prohibited by FCC rule prior to the filing of his application, or not until so advised by counsel after the initial hearing.[25]

13. Schultz replies that he proceeded in good faith on his original staffing proposal, that he recalls some offers of help from friends (even if his recollections of who volunteered were now "less than vivid"), that it was not until 1984 "when the flaw in his ATS plan was pointed out to him" and that the ALJ was therefore correct in allowing Schultz to amend his original proposal, citing, *inter alia, Opal Chadwell.* 4 FCC Rcd 1215 (1989).[26] In sum, Schultz argues that "Mr. Schultz's original staffing . . .plans were neither lunatic nor demented . . . ."[27]

14. *Discussion.* The ALJ's findings of fact, to which Schultz does not except or seek to correct one iota, demonstrate beyond sensible dispute that Schultz's original staffing plan (or, more accurately, anti-staffing plan) was insufficient to effectuate his application proposal to operate 24 hours per day, seven days per week, for the first several months. Concurring with Comstock, we find that the *FSID*, para. 9-10, encapsulates but does not satisfactorily resolve Schultz's yet-pregnant conflict over whether Schultz intended to rely upon "volunteer" assistance at the time he applied, or whether he did not seize upon "volunteer" labor until after the Board's 1984 oral argument. the recorded facts reflect:

> Schultz did not recall how he informed counsel that he had friends who could help him staff the station (Schultz Deposition Tr. 57). He wasn't sure when his counsel asked him how he intended to get around the

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[23] Comstock Exceptions at 34-37.

[24] *Id.*, at 30-32

[25] *Id.*, at 35-36. *Compare also FSID*, para. 18 (Schultz aware of ATS rule prior to filing) *with id.*, para. 20 (Schultz learned of ATS rule from counsel after hearing).

[26] Schultz Reply at 15-23.

[27] *Id.*, at 22.

> ATS rules in operating the station without a staff. He thought it was during or after the Review Board's oral argument. "I just kind of sensed that I was going to be remanded." He said this was based upon the oral argument. He said he could not recall when the conversation occurred (Schultz Deposition Tr. 56-57; 58).

Id., at para. 16. Still, at the hearing Schultz conceded that he had actively sought no firm "volunteer" assistance prior to the filing of his application, *id.*, para. 11, that he had given little thought to his proposed transgression of the ATS rules, *id.*, paras. 18-20,[28] and that he filed in the "belief" that he might call upon friends to help him, "to the least extent possible," if it came to that.[29] We accord with Comstock that this is "no plan at all." The legal standard on staffing, set forth in cases such as *KOWL, Inc.* 49 FCC 2d 962,966 (Rev. Bd. 1974) and *Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 708 (Rev. Bd. 1975), is that we will reject a staffing proposal if it is "inherently improbably." Pepper Schultz is a synonym for that descriptive standard.

Schultz Financial Issue

15. At the instant hearing, "Schultz estimated that for a real 'top notch' radio station he would need 14 employees, whose salaries would total $180,000 (annually). He said he recognized that he could not afford to do this initially, but would have to wait until the money came in (Schultz Deposition Tr. 30-32)." *FSID* at para. 7. Unfortunately, Schultz claimed to have only the following resources available to him to construct the new FM radio station and to operate that station for its

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[28] The point was also made, rather trenchantly, in our prior *Board Decision* that even if Schultz had used an ATS system that was no panacea, since no individual could conceivably fulfill all of the other vital tasks necessary for the successful operation of a commercial FM station, particularly in the impossible conditions Schultz envisaged. *See* 103 FCC 2d at 1063-1065 & n.14. ATS or not, the proposal was ludicrous.

[29] Comstock Exceptions at 31 (quoting Schultz Remand Submission, Statement of Pepper Schultz, p.9).

inaugural three months, without resort to any advertising revenue[30]:

Cash on hand or in banks	$12,607
Gold and other rare coins	1,072
Federal Retirement Account	3,479
	$17,158

Id., at para 39. At various other times he seemingly listed his available assets in 1981 as $13,259 and $14,370, neither of which figures apparently reflected Schultz's claim to valuable coins. *Id.*, para. 40. However, we note in passing that, in our prior *Board Decision*, Schultz's amended proposal indicated an estimate of $74,302.26 for construction and start-up expenses, though this latter estimate seems to have presumed Schultz might actually utilize employees. *See* 103 FCC 2d at 1058.

16. In any event, predicated upon resources approaching Schultz's purported $17,158, he contemplated the following three-month inaugural budget:

Rent ($250 per mo.)	$ 750
Electricity & Water	525
Telephone	75
Gas (auto)	250
Legal	0
Food	1300
Contingencies (Insurance)	800

FSID at para. 28. However (*id.*):

> In attachment B to his Submission to the General Counsel's Office and his Remand Showing, Schultz increased his estimate of utilities (water, electricity,

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[30] The ability to construct the proposed broadcast facility, and to operate the station for three initial months (*without counting any potential advertising revenue*) is the Commission's minimum financial standard. *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); *see also GACO Communications Corp.*, 94 FCC 2d 761, 781 & n. 72 (Rev. Bd. 1983), *aff'd*, FCC 84-212, released May 14, 1984

> telephone) to$1,500 (from $600), added an estimate for ATS monitoring which had not been previously included, added office supplies of $350, and reduced food and contingencies from $2,100 to $1,500. Nothing was added for legal or for auxiliary power.

The rent figure was the rent for his house, *id.*, para. 30; and:

> The increased sum of $1,500 for utilities (which included telephone and all power consumption) was arrived at by discussions between Schultz and his counsel, and was not made contemporaneously with the filing of his 1982 application. He did not know what he had gauged it against (Schultz Deposition Tr. 137).

ID., at para. 31. We interject that although Schultz's budget, even his "amended " budget, set aside no money for legal expenses (he originally file *pro se*), out 1986 *Board Decision* noted that his legal costs were, by then, $20,000. "a deficit he was said to be retiring at $600 per quarter." 103 FCC 2d at 1063 n. 12. It is not now contended that Schultz's current debt for legal fees has diminished in the last three years. *See United Broadcasting Co.*, 53 RR 2d 57, 81 (1983) (financially disqualified applicant neglect, *inter alia,* legal fee allocation).

17. Moreover, while "Schultz's original financing plan included a lease-purchase of equipment in [the] amount of $40,000," *FSID* at para. 45. Schultz conceded that the quotation upon which he based that estimate was dated *after* he had already filed his application, *id;* and that the quotation "did not constitute commitments to lease to Schultz on those terms, but were subject to favorable review of his credit by [the supplier's] credit committee." *Id.* Further, the "original (1980) quotation for the ATS and automation equipment was $8,850 plus $3,000 labor cost." *Id.*, at para. 36. But Schultz unilaterally reduced this cost estimate in 1982 to $4,000, based on his alleged interpretation of a phone call with one Robert Cairns; Schultz could find no letter from that supplier, and he didn't know whether the $4,000 ATS figure included the (previously quoted) $3,000 in labor. *Id.*, para. 37. Finally, while not part of his original plan of financing, Schultz claimed he could building the station with the following used equipment:

Transmitting equipment (used)	$5,950
Automation equipment (some new and some used, including ATS equip)	4,000
Transmission line equipment (used)	400
Antenna equipment (used)	1,200
Misc. installation costs	1,000
	$ 12,550

Id., at para. 32. Even here, however, Schultz based his $5,950 transmitter figure, he believes, on a 1981 quote; but he did not confirm that figure before filing his subject application, and he had no commitments on the said equipment. *Id.*, para. 33

18. *Exceptions.* Comstock submits that the ALJ erred in holding that Schultz was financially qualified at the time he originally filed because: (1) Schultz had not prepared a financial plan prior to filing his application, and his cost estimates were unreasonable in any event[31]; (2) Schultz had no commitment for leased equipment, and he did not demonstrate a lack of question over his credit worthiness for a $40,000 equipment lease[32]; and (3) Schultz lacked the net liquid assets to effectuate his proposal.[33] Schultz replies, citing *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 4767, *appeal pending sub nom. Reimer Broadcasting Ltd.* v. *FCC* No. 88-1659 (D.C. Cir., filed September 8, 1988), that he could rely wholly on leased equipment[34], and that his assets of $17,158 were adequate to meet his projected construction expenses of $12,550 and initial, three-month operating expenses of $4,450.[35]

19. *Discussion.* Having held Schultz not basically qualified under the staffing issue, we might have avoided this issue altogether, but for the bizarre history of this case and the fact that the *Comm'n Remand Order* seems to call for a resolution of the financial issue it specifically designated. With respect to Comstock's first charge that Schultz had

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[31] Comstock Exceptions at 17.
[32] *Id.* at 20-22
[33] *Id.*, at 25-27
[34] Schultz Reply at 16.
[35] *Id.*

not contemporaneously documented his liquid assets or prepared an itemized projection of his anticipated expenses, the Board believes it is bound by two recent Commission decision which -- now for the first time --interpret the instructions to the (then newly) revised broadcast application form in use at the time Schultz filed his subject application, those decision being *Susan S. Mulkey*, FCC 89-217 and *Northampton Media Associate*, FCC 89-215, both released on July 13, 1989.

20. Those companion cases indicate that, before the Commission's prior revision of its basic broadcast application form in *Revision of Form 301*. 50 RR 2d 381 (1981), *see also infra*. para. 21, an applicant had been required to file with its application a "detailed itemization of the projected expenditures and sources of funds[,] . . . a balance sheet, a statement of yearly income and assorted [other] documentations." *Id.*, at 382. While within that 1981 revision the Commission declared that its *substantive* financial requirements remained absolutely unaltered, it was clear from the language of the 1981 revision order that an applicant's supporting documentation need not be filed with the Commission; but, the instructions to the 1981 revised Form 301 contained the following admonition:

> Documentation supporting the attestation of financial qualification need not be submitted with this application *but must be available to the Commission upon request.* The Commission encourages that all financial statements used in the preparation of this application be prepared in accordance with generally accepted accounting principles.

Id., at 388 ("Section III Instructions") (emphasis added). In view of the Commission's continuing requirement that the underlying financial documentation "be available to the Commission upon request," not to say "prepared in accordance with generally accepted accounting principles," the Board had consistently interpreted that 1981 instruction as presup-posing that the requisite financial documentation actually existed, though no submission was required unless requested by the Commission in corroboration of an applicant's bare financial certification. *See, e.g., Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986) (applications for Comm'n review pending). Our interpretation in this regard was somewhat reinforced when, responding in part to the Board's early warning signal in

Dutchess Communications Corp., 101 FCC 2d 243, 245 (Rev. Bd. 1985), that the Commission's new financial certification standard was being abused in case-after-case, the Commission issued a *Public Notice* advising broadcast applicants that, henceforth, its application processing personnel would spot-check financial certifications to assure that actual documentation supported the bare certification. *Certification of Financial Qualifications*, 62 RR 2d 638 (1987). However, the Commission's recent decisions in *Mulkey* and *Northampton Media* now say that the Board's consistent interpretation of the Commission's 1981 Form 301 instruction had been literal, and that an applicant using the 1981 revision of FCC Form 301 may prepare its basic documentation after the fact, if its finances are later challenged, even if that "preparation" comes years after the application filing.

21. Although the Commission has just lately come full circle since its 1981 revision of Form 301, has recognized that its 1981 financial "certification" process was an abject failure, and will again require applicants to submit upon filing both construction cost estimates and all funding sources, *Revision of Application for Construction Permit for Commercial Broadcast Station* (FCC Form 301), 4 FCC Rcd 3853, 3858-3860 (1989), Pepper Schultz did file his subject application under the bare certification version of Form 301; and, pursuant to *Mulkey* and *Northampton Media*. he need not show preparatory documentation of projected construction or initial operating costs. Comstock's exception to Schultz's failure to have documented his projected costs prior to filing his subject application must, accordingly, be rejected under these two new cases.

22. On the other had, it is not argued that -- even under the 1981 Form 301 -- the Commission's *substantive* financial standard had been relaxed; it emphatically had not been. *GACO Communications, supra* note 30; *Dutchess Communications, supra*. Based on the entire record of this proceeding, Schultz has filed to meet his burden of proving that he could construct and operate for an initial three months (without resort to potential advertising income) a new commercial FM broadcast station, even assuming that his net liquid assets approached $17,000. Apart from the deficiency suggested on its face (recalling Schultz's *own*, previous estimate of $180,000 for the first year, and his 1985 estimate of $74,000 to build and operate for the initial 3 months). Schultz's proposed budget and projected construction/equipment expenses of record lay bare the inadequacy of his resources. While these

deficiencies are nearly self-evident, we shall highlight just a few notable gaps.

23. Schultz's anticipated three-month budget (*supra*, para. 16) called for $525 for electricity (and water), but Schultz here made no showing that this projection was at all reasonable, particularly his electric costs for a 24 hour per day operation of a 3 kw broadcast station. Considering the commercial nature of the new station, he did not explain the very low estimate for telephone expenses either. Nor did his record budget appear to account for the most routine items such as stationery, office supplies, postage, sales expenses, advertising,promotion, *etc.* Of course, considering that Schultz's budget allotted no money whatever for even one employee, these immediate frailties pale into cosmic insignificance. While there is, naturally, no bottom limit to what an applicant may budget for probable failure, the *raison d'etre* for the Commission's basic financial qualification requirement is that it believes some irreducible minimum is necessary for a reasonable likelihood of success. *See GACO Communications, supra.* Schultz has done little more than proffer to us his anemic three-month budget; he has not explained convincingly its probably sufficiency.

24. The same is true to Schultz's $12,550 estimate for equipment and construction costs (*supra*, para. 17). For instance, whereas the ATS equipment was central to Schultz's proposal (however fantastic) to operate without any staff whatsoever, his unilateral reduction of likely ATS expenses from nearly $12,000 to $4,000, without an objective confirmation of that later reduction, is typical of his lack of a persuasive showing of reasonable cost projections. Indeed, as the ALJ pointed out in his *Supplemental Initial Decision*, Schultz had not even provided for air condition in a climate where 100 degree (plus) temperature are frequent nor even for the equipment universally used to produce or record commercials, let alone produce news or public affairs programming (*see supra* para. 5). Noticeably absent form Schultz's equipment list also is the entire panoply of equipment generally common to commercial radio stations (consoles, turntables, microphones, tape recorders, production studio, sound-proofing, monitors, *etc.*), although we concede to no practical idea of what Schultz actually may have had in mind for the station, and the record furnishes scant clue.

25. As to Schultz's alternative proposal to lease $40,000 worth of

equipment, we do not disagree that the Commission's policy change announced in *Merrimack Valley Broadcasting, Inc.* 82 FCC 2d 166, 168 (1980) (subsequent history omitted), no longer requires that an applicant proposing to lease certain broadcast equipment demonstrate its ability to do so, absent evidence that the applicant's credit worthiness is subject to doubt.[36] However, while Schultz claims that his unsubstantiated leasing proposal is controlled by *Armando Garcia, supra* the situation here is quite dissimilar. There, Garcia had received prior "written assurance" from the equipment supplier, a detailed description of the equipment and the terms of the loans, as well as a firm commitment from that equipment firm's president that a lease would be extended. *See id.*, 3 FCC Rcd at 1066. Here, Schultz merely pondered "proposals"; he neither sought nor received supplier assurances. *See FSID*, paras. 45-46. Additionally, there is not a scintilla of evidence that any equipment leasing company was aware of Schultz's scanty resources, of his extraordinary proposal to initiate a new commercial FM broadcast station with no employees, using every dime of his alleged liquid assets, or of the other startling operating conditions Schultz depicted. (*See supra* para 5). Even Schultz admits that his fundamental operating proposal was severely "flawed,"[37] to say the least; and, we believe that evidence present by Schultz ineluctably raises a *prima facie* question as to whether a conventional equipment supplier would extend $40,000 in credit for Schultz's abnormal operation. Schultz was keenly aware of the financial issue against him, of the skepticism about his financial resources and his superhuman operating proposal, and yet he did not adduce at this third hearing a solitary grain of evidence to support his bald claim of an ability to lease $40,000 in essential broadcasting equipment. Under the facially troublesome dimensions of Schultz's overall proposal, we find that Schultz's credit worthiness was patently subject to doubt, and that Schultz made no effort to exhibit his credit worthiness in 1981 or to demonstrate serious offers to lease to the eccentric station Schultz purportedly envisaged. Finally, even if we

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[36] It is ironic that the *Merrimack Valley* Commission based its relaxation of its equipment leasing showing on the fact that it was then (1980) in the process of reducing its overall financial showing requirements, *see* 82 FCC 2d at 168, a deregulatory thrust the Commission was recently moved to reverse. *See Revision of Application for Construction Permit for Commercial Broadcast Station, supra* para. 21. Among other things, the Commission will again require a full financial resource disclosure, including a discussion of any credit extension. 4 FCC Rcd at 3868 n. 68.

[37] Schultz Reply at 20.

assume, *arguendo*, the availability of leased equipment, Schultz's lack of apparent resources for other routine start-up expenses (e.g., total lack of personnel expenses) renders the question of leased equipment almost moot. Taken as a whole, Schultz has utterly failed to demonstrate his financial ability to construct and operate a viable commercial broadcast station. *See United Broadcasting Co., supra*, 53 RR 2d at 78-81 (applicant disqualified: cost estimates and resources "unrealistically low"). *See also GACO Communications, supra; cf. Central Alabama Broadcaster, Inc.*, 97 FCC 2d 654 (Rev. Bd. 1984), *aff'd sub nom. Oyster v. FCC*, 776 F. 2d 365 (D.C. Cir. 1985) (Table).

Schultz's Post-Hearing Amendments

26. In both our *Board Remand Order (see supra* para. 3) and in the *Board Decision* (*see supra* para. 5), we rejected Schultz's post-hearing amendments to his staffing and financial proposals because of his glaring failure to meet the required "good cause" test. We need not again rehearse the practical policy reasons undergirding the Commission's strict "good cause" test, *see Board Decision*, 103 FCC 2d at 1056-1058; it is obvious why, in a comparative setting, all competing proposals must be frozen at an early point in time so that a static comparison may be fairly made.[38] The *Comm'n Decision (see supra* para. 6) stoutly reaffirmed that amendment principle in this case, and it is beyond gainsay that the Commission's later *Remand Order* did not abandon that abiding regulatory principle. Instead, it reluctantly accepted Schultz's contention that he lacked sufficient opportunity at the two prior hearings to prove out his *original* application proposals, since the ALJ had erroneously accepted his very late amendments. The plain and singular purpose of this third evidentiary hearing was to permit Schultz to support (if he could) those *original* proposals, particularly in view of apparent "discrepancies" between his submissions to the General Counsel and his representations at prior occasions in this proceeding.

27. Despite these antecedent appellate rulings, the ALJ commended "that the notion of *stare decisis* may not be controlling here," *FSID* at

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[38] For an extended discussion of the several reasons why the Commission imposes a strict, 6-point "good cause" test on post-hearing designation amendments to applications, *see Daytona Broadcasting Co, Inc.*, 97 FCC 2d 212, 215-217, (Rev. Bd. 1984) (subsequent history omitted).

para. 68 (footnote omitted; and it is clear that the ALJ's ultimate conclusion that Schultz was basically qualified incorporated, again, Schultz's post-hearing designation amendments. *See, e.g. FSID*, para. 72 (Schultz abandons ATS proposal as starkly inconsistent with FCC rules); para. 73 ("Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding") [39]; paras. 77 and 91 (accepting a wholesale reduction of Schultz's proposed weekly operating hours from 168 to 72). With great respect to the ALJ, the doctrine of *stare decisis* is inapposite here, and we are duly instructed in this remand phase by "the law of the case," *see generally Northwestern Indiana Telephone Co., Inc.* v. *FCC*, No 88-1521, slip op. at 12 (D.C. Cir. April 11, 1989), which juridical doctrine demands that we focus on the efficacy of Schultz' *original* proposals, unvarnished by his post-hearing modifications.

28. Citing the Commission's recent decision in *Opal Chadwell, supra*, Schultz now urges that the ALJ had broad discretion to accept his late application amendments because Schultz "proceeded in good faith," has been "reasonably diligent in attempting to establish his qualifications," and had "a reasonable basis for his original financial and staffing plans." [40] Not only does the record belie Schultz's claims of the reasonableness of his *original* proposals, and of diligence in pursuing rational amendments, his reading of *Opal Chadwell* is perpendicular to its true holding. There, and not unlike the instant case, the Commission on appeal called for Chadwell to supplement her initial financial proposal; but, finding her supplemental material to be inadequate to support her basic financial enqualification, the Commission remanded the entire case back to the ALJ with the following injunction:

> In this regard, the ALJ would have to examine Chadwell's original proposal to determine whether she had a reasonable basis for making it. *See Pepper Schultz*, 2 FCC Rcd 1476, paras. 3-4 (1987), *recon. granted on other grounds*, 3 FCC Rcd 1200 (1988).

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[39] At *FSID*, para. 73, the ALJ states that the alterations in Schultz's staffing proposals were made "in response to changing conditions." There is no further discussion of the nature of these "Changing conditions," although the ALJ strongly suggest elsewhere that a succession of appointments with Dr. Reality were the sole reason. *See, e.g. id.*, at paras. 73, 96.

[40] Schultz Reply at 15-16.

4 FCC Rcd at 1217, Especially in light of *Opal Chadwell's* citation to this very remand, there is no doubt that Chadwell was required -- as was Schultz here -- to demonstrate the validity of her *original* proposal at her supplemental hearing. No broadcast aspirant may proceed to hearing with a fatally flawed application proposal, and then freely amend each time its proposals are subsequently questioned or debunked on record, 47 CFR §73.3522; *see also Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 and 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd sub nom. Royce Int'l. Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (Table), *cert. denied*, 474 U.S. 995 (1985); *Dutchess Communications, supra; cf. Coastal Bend Family Television, Inc.* 94 FCC 2d 648, 652-656, *recon. denied*, 95 FCC 2d 551 (Rev. Bd. 1983), *remanded sub nom. Christian Children's Network, Inc.*, 101 FCC 2d 612 (1985) (on financial amendment issue), *on remand*, 1 FCC Rcd 982 (Rev. Bd. 1986)(applicant's original financial proposal rejected), *review denied*, 2 FCC Rcd 7395 (1987), *aff'd by judgment*, No. 88-1012 (D.C. Cir. April 24, 1989). To the extend that the ALJ's conclusions accepted Schultz's late amendments, and qualified Schultz on other than his *original* proposals, Comstock's exceptions are granted.

Comstock Ex Parte Issue

29. The ALJ concluded that the findings under the *ex parte* issue established that the letter written to the ALJ by Senator Hecht (reprinted *supra* note 3) constituted a prohibited *ex parte* presentation. The letter, the ALJ found, went beyond that of a mere status inquiry, and dealt with the merits of a matter *sub judice*. Further, the ALJ found, the Senator's letter to him enclosed a copy of Comstock's letter to the Senator which sought "help" on Comstock's behalf, while noting that "serious questions" existed pertaining to Schultz's application, *FSID*, para. 81. The ALJ also found that Comstock's violation of the *ex parte* rules was intentional as well as current; and, even if deemed to be an isolated event, was not entitled to mitigation because of its seriousness. *Id.*, para. 87. In concluding that Comstock's application must be denied, the ALJ emphasized that Comstock's principals, Messrs. Carroll and Akert, "were greatly less than candid and forthright" in refusing to acknowledge that an *ex parte* communication had taken place, even though the evidence established that Comstock attempted to point out the merits of its case and the flaws in Schultz's application. *Id.*, para. 94.

30. In its exceptions, Comstock argues that its two principals did not knowingly violate the Commission's *ex parte* rules, because they did not learn of the existence of the rules until counsel informed them of the FCC Managing Director's receipt of Senator Hecht's letter. Beyond this lack of awareness of the existence and substance of the Commission's *ex parte* rules, Comstock argues that neither of its principals intended to solicit an *ex parte* presentation, and their only objective was to determine how much longer this protracted proceeding was going to take. In this regard, Comstock denies that Carroll was aware that Ms. Judy Duke, to whom he spoke in Senator Hecht's office, intended to forward the Senator's letter to the presiding judge. Comstock further argues that the conduct of its principals was not so aggravated as to warrant disqualification, citing Commission and Board holdings in *Black Hills Video Corp.* 1 FCC 2d 1222 (1965); *Country Broadcasting Co.*, 71 FCC 2d 1222 (Rev. Bd. 1979); *Moore County Radio Co.*, FCC 86-95, released March 3, 1986; *Charles R. Lutz*, 56 FCC 2d 385 (1975); and *Stearns County Broadcasting Co., Inc.*, 104 FCC 2d 688 (Rev. Bd. 1986), *rev. denied*, 3 FCC Rcd 2987 (1088). Specifically, Comstock maintains the record shows that the conduct in question is a single, isolated incident, which would ordinarily warrant no sanction, citing *Harold James Sharp*, 56 FCC 2d 708 (Rev. Bd. 1975), and is far less serious than the record in *Stearns County*, where a knowing and repeated violation of the *ex parte* rules resulted in dismissal, but not disqualification of the applicant. Finally, Comstock submits that the ALJ's adverse candor finding concerning its principals was not based on the hearing testimony, and was in fact contradicted by a finding (at Tr. 474) that Carroll has testified truthfully. Moreover, Comstock states, the ALJ made no demeanor filings to support his adverse candor conclusion. Comstock concludes that it should be found to be fully qualified.

31. In response to Comstock, Schultz maintains that there is no dispute at to the ALJ's findings under the *ex parte* issue, but only as to what conclusions should be drawn from them. In Schultz's view, not only was an *ex parte* presentation solicited, but following a conversation between Carroll and Ms. Duke, an *ex parte* communication was made. Schultz contends that Comstock had the burden of proof under the designated issue, but failed to meet it in any respect. Schultz also disputes a number of Comstock's specific contentions. For example, it challenges Comstock's claim that Carroll was not even trying to get the proceeding expedited, but only trying to find out how much longer it

was going to take, by citing Akert's testimony that he wanted to see if anything could be done to expedite matters (Comstock Exh. 7; Tr. 362), as well as the testimony of William Farr, the head of Senator Hecht's Reno office, to the same effect (Joint Exh. 2, p. 2). Schultz further disputes Comstock's claim that its principals had no idea that Senator Hecht would attempt to communicate with the presiding judge, citing Carroll's testimony to the effect that he discussed with Ms. Duke the identity of the judge presiding in the case to whom any inquiry would be directed (Tr. 465). Also Schultz states that, despite Comstock's claim that its principals were ignorant of the *ex parte* rules, Carroll testified that he understood Comstock's conduct was wrong (Tr. 475). Finally, Schultz maintains that Comstock's disqualification was properly based on both its principals' evasive attempts to deny they had done anything wrong, even while contending that they sought no advice from counsel on the subject (Tr. 423), and because of their impermissible attempt to bring improper pressure to bear on the ALJ in this proceeding.

32. The historical purpose of the Commission's *ex parte* rules has always been very simple, that is, to ensure that its decisions are fair and impartial and based on a public record free of influence from non-record communications between decision-makers and outside persons. *Report and Order, Ex Parte Communications*, 2 FCC Rcd 3011, 3012 (1987). To this end, the Commission's Rules prohibit *ex parte* presentation -- those not served on the parties (or, if oral, made without notice or opportunity to be present) -- made to or from decision-making personnel in restricted proceedings. 47 C.F.R. 1.1202(b). Adjudicative proceedings that have been designed for hearing are restricted proceedings. 47 C.F.R. 1.1204(a)(1); 47 C.F.R. 1.1208(c)(1)(i). Any communications directed to the outcome or merits of a restricted proceeding are prohibited; however, inquiries relating solely to the status of a proceeding are permitted. 47 C.F.R. 1.1202(a). Nevertheless, "a status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing of a proceeding" is prohibited. 47 C.F.R. 1.1202(a). Finally, no person may solicit or encourage others to make a prohibited *ex parte* presentation, 47 C.F.R. 1.1210, although the solicitation of purely status inquiries is not prohibited. *Ex Parte Communications, supra*, at 3013.

33. The resolution of any *ex parte* issue, and this case is no exception, always depends heavily on the particular facts and circumstances surrounding the alleged infraction. Our analysis must start, therefore, with the question of whether an *ex parte* presentation was, in fact, solicited or encouraged by Comstock or made on its behalf. Our answer to this question, despite Comstock's denials, is in the affirmative.

34. Comstock's claim that its principals' only objective was to determine how much longer this case was going to take is contradicted by the plain language of the letters in question, as well as other record evidence. Thus, the April 18, 1988 letter from Comstock principal Robert Carroll to Senator Hecht (reprinted *supra* note 4), seeking his "help with a matter now pending before the Federal Communication Commission," contains adverse characterizations of its opponent in this case. It specifically asserts that "[o]n appeal to the FCC Review Board, we raised some very serious questions as to his [Schultz's] ability to own and operate a station" and that "we were expecting to get a favorable ruling from the Commission" prior to its decision "to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time . . . ." The Carroll letter further opines that "this is an already over-saturated market. Not only is the idea of preselling commercials impossible, but there are stations who have been on the air for several years still operating at a loss." Finally, Carroll states that he "would like to see where this action may be headed" and expresses appreciation for "any inquiries your office may be able to give to this matter." In fact, there is only token reference to how long the proceeding may take, or as to its current status. As such, it goes beyond the neutral solicitation of a status inquiry, which is the only form of solicitation permitted by our rules.

35. Moreover, the Commission has also clarified that a statement by a party that seeks to dramatize why the timeliness of Commission action is of special importance to it, or otherwise expresses an opinion on timing, is also improper. *Ex Parte Communications, supra*, 2 FCC Rcd at 3013. Thus, the April 18, 1988 letter's references to Schultz's qualifications in the context of Comstock's expectations of a favorable ruling from the Commission after six years of waiting, also appear to have gone too far. This impression is confirmed by Carroll's own testimony concerning why he thought it appropriate to comment to the

Senator on Mr. Schultz's ability to own and operate a station (Tr. 447-449):

> I think we wanted to point up that we thought we had a very solid case. That this matter was twice. . . . turned back by the Review Board in our favor and that . . . I felt I needed to point that out what our good points were . . . instead of just writing a letter and saying please look into this matter. A little scenario, if you will, of the case . . . [W]e raised what I thought were some very serious questions about Mr. Schultz's ability to own and operate the station. . . I think I needed to give the Senator some background and putting us hopefully in a favorable position so that there would be some credence to that letter in his mind.

Carroll's purpose -- in his own words, putting his applicant in a favorable position -- was to "state or imply a preference for a particular party," to indicate "why timing is important to a particular party," and to "influence" or "address the merits or outcome", all in violation of 47 C.F.R. 1.1202(a). In sum, we agree with the ALJ that Carroll's letter intended to solicit an *ex parte* presentation of Comstock's behalf in this proceeding.

36. The second letter, that sent by Senator Hecht to Judge Tierney on April 22, 1988, was also improper. The letter, written after a telephone conversation between Carroll and Ms. Duke of Senator Hecht's office, not only enclosed a copy of Mr. Carroll's letter, but also volunteered the information to the judge presiding in this case that Comstock's opponent, Mr. Schultz, "applied for and was granted a license back in 1974 or 1975, but never put the station on the air." Ms. Duke testified that she learned the information regarding Mr. Schultz's prior authorization from Carroll, and that she thought this "might have some significance, since there seemed to be no reason for the FCC to grant another permit to someone who in the past had been granted one but had not built the station." (Joint Exh. 3. p.2) While the Commission has long held that an inquiry to, or from, an elected official regarding administrative delay is permissible, *Fine Music, Inc.*, 8 FCC 2d 529 (1967); *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd.), *recon. denied*, 88 FCC 2d 901 (Rev. Bd. 1981), *rev. denied*, FCC 82-62, released February 3, 1982, *affirmed sub nom. Amigos Broadcasting, Inc. v.*

FCC, 696 F2d 128 (D.C. Cir. 1982), the Senator's letter went well beyond a mere status inquiry or complaint about delay, and it did comment negatively on Schultz. Thus, by its plain meaning and by Ms. Duke's open admission, this letter went to the merits of the case. As such, the second letter was an *ex parte* presentation made in violation of the Commission's Rules. The inclusion of a copy of Mr. Carroll's offending letter aggravated that infraction.

37. In its defense, Comstock makes much of its claimed lack of knowledge of the Commission's *ex parte* restrictions and of its overall innocence. These arguments are unavailing insofar as we conclude that an *ex parte* solicitation and presentation have been made here. To begin with, the Commission has always held that intent is irrelevant in determining whether a presentation has been made, *Ex Parte Communications in Hearing Proceedings*, 1 FCC 2d 49, 56 (1965); *Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847 (Rev. Bd. 1973), *review denied*. FCC 74-476, released May 8, 1974, and it is sufficient that an applicant intended to do the act in question *i.e*, write or solicit *ex parte* letters. Indeed, it is not necessary to show that an applicant knew it was violating the rules when the letters were written, because it is charged with knowledge of the rules and lack of knowledge will not entirely excuse the violations. *Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982), and cases cited therein.

38. Furthermore, Comstock's claims of innocence are contradicted by its own testimony. On the one hand, Robert Carroll, in his written testimony, stated that although he had prior broadcast experience, he had no ownership experience and had not been involved in an FCC proceeding, that had he been aware of the rules he would have complied despite his feelings of frustration over the duration of the proceeding, that he only hoped Senator Hecht's inquiry might expedite matters, and that he did not anticipate that the Senator would write to the ALJ or attach his letter. (Comstock Exh. 6). At the hearing, however, Carroll conceded that he knew it would be wrong to ask the Senator to call the ALJ about the case. (Tr. 452-453). He explained that he occasionally has coffee with a federal court judge and understands that it is wrong to discuss pending cases with judges. (Tr. 459, 466-467). Furthermore, Carroll's claim that he did not anticipate that the Senator's office would contact the ALJ is belied by his further testimony that he specifically discussed the identity of the ALJ with Ms. Duke in their telephone

conversation (Comstock Exh. 6, p. 2; Tr. 465). Although Comstock claims that Ms. Duke already knew this information (Comstock Br. at 12), Ms. Duke expressly testified that Carroll provided her with the pertinent information including to whom the letter should be sent (Joint Exh. 3, p. 2). On the basis of this evidence, we reject Comstock's claim that its principals' actions were wholly innocent and unintentional.

39. Comstock's ultimate contention is that even if its principals have transgressed -- and we believe the record indicates that they did solicit an *ex parte* presentation to a decision-maker in an attempt to influence the outcome of the proceeding -- no severe sanction should be imposed here. Any party who is found to have violated or caused to be violated the Commission's *ex parte* rules is subject to disqualification or other sanction "as may be appropriate." 47 C.F.R 1.1216. In considering what may be appropriate, we point out that intent, while not a factor in determining whether a presentation has been made, is pertinent in weighing whether (and what) sanction is called for. *Voice of Reason, Inc., supra*, at 708-709. In this regard, Comstock's reliance on such cases as *Country Broadcasting Co.*, and *Moore County Radio Co., supra,* is unavailing, because they involved either a letter not intended to be sent to a decision-maker or a solicitation not intended to influence the proceeding, neither of which circumstance perfectly corresponds to the record in this case. Similarly, Comstock's reliance on *Black Hills, supra,* which emphasized that "surreptitous efforts" to influence the Commission were not in evidence, is not determinative because all *ex parte* communications are, by definition, secretive to some extent. *Charles Lutz, supra*, on the other hand, indicates that unfamiliarity with the Commission's rules mitigates the inference of a culpable intent, and here there is a claim, here unrebutted, that Comstock's principals did not know of the specific *ex parte* prohibitions. The impact of this factor is at least partly offset, however, by other evidence indicating that Carroll understood that it was wrong to approach a hearing judge in a pending case.

40. Comstock's strongest argument, in terms of precedential support, is that its infraction was an isolated event. The Commission, and hence the Board, have held that where an *ex parte* violation is a single incident, and not repeated, no severe sanction will follow. *Smaller Market UHF TV Stations Group*, 81 FCC 2d 429, 439-440 (1980); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 1027-1028 (Rev. Bd.

1982); *Harold James Sharp, supra,* at 709.[41] In this regard, while Comstock's letter to Senator Hecht resulted in a second letter being sent to the ALJ, there was essentially only one transaction involving a solicitation of assistance from a single Senatorial office. By contract, for example, in *Voice of Reason, supa,* the applicant's disqualification under the *ex parte* issue was based on a solicitation sent to thousands of persons on his mailing list. Similarly, in *Desert Empire Television Corp., supra,* the Commission imposed only a modest monetary forfeiture where a licensee engaged in a wilful *ex parte* communications on at least three separate occasions and where the violation was repeated after warning, and even after having been informed specifically concerning the Commission's *ex parte* rules. And, in our most recent decision in this area, *Stearns County Broadcasting Co., Supra,* where the applicant made numerous oral and written solicitations of *ex parte* assistance from her two United States Senators and her Congressional Representative, leading the Board to conclude that the rule violations were wilful and repeated, the applicant was not disqualified. We pointed out that our milder dismissal sanction in that case was based on the fact that the *Stearns County* applicant had previously violated the *ex parte* rules in connection with a prior FM application, and had been expressly warned by the Commission that future violations would not be countenanced. *Id.*, at 690.

41. Against the backdrop of pertinent precedent,[42] we conclude that Comstock here engage in the solicitation of an *ex parte* presentation in circumstances that strongly suggest that its behavior was not entirely innocent or unintentional, but the infraction was not repeated and not made in the face of specific knowledge of the commission's rules or prior warnings that such conduct was unacceptable. While we believe the violation was a palpable one, and have therefor evaluated it in some detail, we conclude, based largely on the results reached in *Desert Empire* and *Stearns County, supra,* that its conduct falls this side of

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[41] In *Sharp,* the Board suggested a comparative demerit might be appropriate. This remedy, of course, is no longer available to us, *see Character Qualifications,* 102 FCC 2d 1179, 1230-1232 (1986); *Broadcast Associates of Colorado,* 104 FCC 2d 16, 17-19 & nn. 4, 5 (1986). Even if we could have levied a *comparative* demerit here, Schultz's disqualifications would make such a demerit moot.

[42] We have not omitted from our consideration the court's holding in *Amigos Broadcasting, Inc. v. FCC, supra,* which focused, however, on oral communications, which are not present on this record.

requiring imposition of a sanction. In so holding, however, we trust that Comstock's principals, chastised by their experience in this case, will not again seek to improperly advance the outcome of a proceeding to which they may be parties at the Commission.[43,44] should they do so, there is no doubt than an appropriate sanction will follow.

CONCLUSIONS

42. For the reasons expounded above, we must set aside the *FSID*

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[43] There is a disagreement in the parties' contentions regarding the impact of the ALJ's findings at *FSID*, para. 94, that Comstock's principals were "less than candid and forthright" in denying that an *ex parte* presentation occurred. Were this a credibility finding based on the ALJ's observation of the witnesses, it might, of course, be entitled to significant deference. *Catoctin Broadcasting Corp.*, 2 FCC Rcd 2126, 2127 (Rev. Bd. 1987); *Telestar, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987). The FSID does not contain specific demeanor findings and the ALJ's language, albeit susceptible of more than one interpretation, appears more in the nature of a rejection of Comstock's legal position rather than a true credibility finding based on witness demeanor. This impression is reinforced by the ALJ's specific transcript comment (at Tr. 474) that Robert Carroll had "answered the questions on cross-examination I think honestly for [Schultz's counsel]." Nor, we note, did the ALJ designate a lack of candor/misrepresentation issue, generally a prerequisite for a valid finding of intentional deception. *See generally West Coast Media, Inc., v. FCC*, 695 F.2d 617 (D.C. Cir. 1982). Finally, there is no further reference or negative finding in the *FSID* pertaining to Comstock's principals' truthfulness and reliability which would raise a sufficiently substantial and material question as to that applicant's qualifications to be a Commission licensee. *Cf. Rockledge Radio, Ltd.*, FCC 89R-39, released June 26, 1989, and cases cited therein.

[44] The board Chairman does not join in note 43, above, because he agrees with the ALJ's remarks that Comstock's principals were "less than candid and forthright." First, he feels that Comstock attempted to shade the fact that it, not the Senator's staff, specifically targeted the ALJ for political pressure, not only to expedite the case, but about the merits of the applications. *See supra* paras. 34, 36 and 38. Second, the Board Chairman believes that Comstock was less than candid in continuing to insist that it was unaware that its *ex parte* solicitation was wrong, despite the fact that Carroll's past contact with a federal judge had taught him that it was wrong to discuss pending cases with judges. *See supra* para. 38. "He who engage[s] in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding." *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961), *cert. denied sub nom. Public Service Television, Inc. v. FCC*, 368 U.S. 841. Since the *ex parte* violation in this case was aggravated by less than candid testimony about that matter (the Board Chairman believes), the Commission, which has plenary authority over its precedents, is free to find that this case is an egregious as *Stearns County, supra*, and to dismiss Comstock's application.

conclusion that Schultz was basically qualified to acquire a broadcast Construction Permit when he filed his application. The key, perhaps, to the lack of resources behind his application is suggested at *FSID*, para. 18, where the ALJ records Schultz's concession that "he did not think he would be going thorough a hearing with a competing applicant (Schultz Deposition Tr. 42)." On the other side of the coin, Schultz's attorney furnishes us the answer to the collateral question of how Schultz's facially incredible proposal cold have emerged unscathed from the FCC application "processing line".

> [Schultz Counsel]: It has not been my experience that the staff spends a lot of time reviewing the financial and staffing proposals.

Tr. of Oral Arg. of July 21, 1989 at 504. So we have noticed ourselves.

43. Indeed, in our previous *Board Decisions*, we orated:

> This case, while perhaps a fluke, does nevertheless illuminate the downside risks of a much simplified application process, through which channels occasionally slip those without the barest ability to construct and operate a full power broadcast station, let alone possessing the considerable resources requisite to serving the American public in the manner to which it has become accustomed.

103 FCC 2d at 1063. Schultz, of course, filed his subject application at the grand debut of the Commission's prior revision of FCC Form 301, which had eliminated the requirement for an itemized cost estimate, and permitted an applicant to merely "certify" as to its financial ability (by checking a box), without submitting supporting documentation. These lacunae in the 1981 application form revision (amongst other deficiencies) wreaked subsequent havoc on our application and hearing processes, as attested by the commission's April, 1989 revision of Form 301, once again, to reimpose most of its pre-1981 requirements. *See surpa* para. 21.

44. As the record at hand exhibits clearly, Schultz filed here without much realistic preparation; and he has not -- in at least two rather

generous attempts -- demonstrated by a preponderance of the record evidence that his initial staffing or financial proposals had any more plausibility than had been reflected on their face. Furthermore, to the degree that the *FSID* conclusions on Schultz's relevant proposals incorporated his exceedingly late amendments, despite Schultz's plain failure to meet the six-point "good cause" test, they must be modified. Pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), the cognizable record leaves Schultz unqualified for this Construction Permit.

45. Obviously consternate with "the seeming infinity of this epic", *FSID* at para. 89, Comstock's Bob Carroll was agitated to violate one of the cardinal strictures of our adjudicatory conventions when he sought the supervention of a U.S. Senator, after the Commission remanded this case for yet a second supplemental hearing. The law views very darkly indeed transgressions of the APA's *ex parte* provisions, 5 U.S.C. § 557 (d). *See WKAT, Inc. v. FCC,* 296 F.2d 375 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 841; *Amigos Broadcasting, Inc. v. FCC, supra.* We find that Carroll solicited and abetted an *ex parte* contact in this case, and that Senator Hecht's letter to the ALJ, which appended Carroll's own letter commenting on the merits of Schultz's application, was a prohibited *ex parte* contact. In our *Stearns County* decision, we reviewed the sanctions applied by the Commission in its more current *ex parte* cases and found that no recent applicant had been found wholly unqualified to be a licensee, including those cases involving "willful and repeated" violations of the *ex parte* rules. *See, e.g., Charles Lutz, supra.* Even in *Stearns County,* where the license-applicant had violated the *ex parte* rules in connection with a preceding broadcast application, and the Commission had expressly warned that licensee that a repeat performance would result in a severe administrative response, the Board regarded itself as constrained against total disqualification of that licensee, by dint of recent Commission case precedent. The Commission denied review of our *Stearns County* decision, thus ratifying our declination to disqualify the offending applicant for licenseeship. On the less egregious facts of this case, we believe that the ALJ's disqualification of Comstock runs afoul of contemporary Commission precedent. And, as this is the first offense, we find that *Stearns county* is not a predicate for the still milder sanction of dismissing Comstock's application without a fatal disqualification. *But see note* 44, *supra.* Because Comstock's application remains the only

qualified one before us, it must necessarily prevail.

46. ACCORDINGLY, IT IS ORDERED, That the application of Comstock Broadcasters, Inc. (File No. BPH-820628AQ) for a Construction Permit for a new FM broadcast station at Sparks, Nevada is GRANTED, and the application of Pepper Schultz (File No, BPH-820519AK) is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FCC 90-200

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS,INC. Sparks, Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1990 ; Released: May 30, 1990

By the Commission:

1. Before the Commission is a decision of the Review Board granting Comstock Broadcasters, Inc.'s application for a new FM radio station in Sparks, Nevada, and denying Pepper Schultz's mutually exclusive application. *Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989).[1] We agree with the Board's resolution of this case. We wish, however, to comment on certain matters.

I. SCHULTZ'S QUALIFICATIONS

2. Previously, the Commission remanded this proceeding for a hearing to determine whether Schultz had viable staffing and financial plans when he filed his application on May 19, 1982. *Pepper Schultz*, 3 FCC

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[1] The following pleadings are pending: (1) an Application for Review filed September 13, 1989 by Pepper Schultz and an opposition filed September 28, 1989 by Comstock Broadcasters, Inc.; (2) A contingent Application for Review file September 18, 1989 by Comstock and an opposition filed October 2, 1989 by Schultz; and (3) a Petition for Leave to File Reply filed October 12, 1989 by Comstock, and an opposition filed October 16, 1989 by Comstock.

Rcd 1200 (1988). (We found no good cause for permitting Schultz to amend these questionable proposals but agreed with Schultz that he should be given a further opportunity to demonstrate the adequacy of his unamended proposals.) We agree with the Board that the record indicates that Schultz was not diligent in formulating his plans and, in fact, did not have viable plans at the time he filed his application.[2]

3. Schultz proposed to operate his station 168 hours a week (24 hours a day) without hiring any employees. 4 FCC Rcd at 2387 ¶ 8.[3] Critical to this proposal was the use of automation equipment, including an automatic transmission system (ATS) -- with a monitoring point located at telephone answering-burglar alarm service -- to regulate the proposed station's technical operations. Schultz also seeks to rely on the use of unpaid volunteers. Schultz's ATS proposal was in violation of former 47 C.F.R. §73.346, in force at the time he filed his application. *See also Automatic Transmission Systems,* 59 RR 2d 735, 738 ¶ 17 (1986) (47 U.S.C. § 318 continues to prohibit operation unattended by a licensed operator). Moreover, Schultz failed to demonstrate that he had any arrangements to use unpaid volunteers as part of his original proposal. Tr. 220-22, Joint Exh. 1 at 25, 80-81, 84.

4. In seeking to establish his financial qualifications, Schultz claimed to have $17,158 in net liquid assets available. 4 FCC Rcd at 2389 ¶ ¶ 41-44. He asserts that his amount would be sufficient to cover his

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[2] One matter in particular deserves comment. In ruling on the staffing and financial issues, the Board made findings concerning proposals set forth in an application that Schultz filed for Sparks in October 1, 1981. Schultz complains that the Board erred in considering these proposals because the October 1981 application is no longer pending. We find that any confusion caused by the Board's references to the October 1981 application is inconsequential. Schultz testified that he did not change his staffing plans between October 1981 and May 1982 (when he filed the pending application). Joint Exh. 1 at 15, 19. As to his financial proposal, Schultz testified that, while he kept track of changing costs and revised his estimates in minor respects between October 1981 and May 1982, he did not formulate a new proposal. Joint Exh. 1 at 15-17, 112, 125-26. In the absence of decisionally significant modifications of his proposals between October 1981 and May 1982, the Board's references to the earlier application are not misleading and do not prejudice Schultz.

[3] Schultz now suggests that he could have operated that station as few as 72 hours a week consistent with the Commission's rules. *See* 47 C.F.R. § 73.1740. This was not, however, his proposal. Joint Exh. 1 at 13, 19.

estimated three months' operating expenses of $4,430. with respect to construction costs, Schultz claims that he could acquire new equipment by means of a lease agreement. Alternatively, he proposes to purchase used equipment costing $12,550, relying on his net liquid assets. *Id.* at 2388 ¶ ¶ 28-32.

5. We agree with the Board that Schultz failed to demonstrate his financial qualifications. First, Schultz failed to provide reasonable assurance of a present intention on the part of an equipment supplier to enter into a credit arrangement as required by the application form. Form 301 (Jan. 1982) at 5. Although *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168 ¶ 3 (1980), dispenses with the requirement that a commitment letter specifically indicate that the supplier is satisfied with the applicant's credit-worthiness, it does not dispense with the requirement that the supplier provide reasonable assurance of a willingness to fund a particular proposal. Hence, the Board correctly distinguished this case from *Armando Garcia,* 3 FCC Rcd 1065 (Rev. Bd. 1988), *rev. denied,* 3 FCC Rcd 4767 (1988), in which such assurances were given. 4 FCC Rcd at 6399-400 ¶ 25. The letters submitted by Schultz (which are dated after Schultz certified his financial qualifications) do not provide such assurance. They are merely statements of the suppliers' customary terms. Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Atts. D, E.

6. We also agree with the Board that Schultz's proposal to rely on used equipment rests on cost estimates that are excessively speculative given the small margin of error provided by Schultz's liquid assets. *See* 4 FCC Rcd at 2388 ¶ 33 (transmitter); *Id.* at 2389 ¶ ¶ 36-37) (ATS equipment). Indeed, information submitted by Schultz indicates that he received quotations from Transcom Corporation, an equipment firm, which were significantly higher than Schultz's estimates, although they do not include ATS equipment. Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Att. G; Opposition to Motion to Enlarge Issues, filed April 18, 1985, by Pepper Schultz, Att.

7. Finally, despite the fact that the Commission explicitly indicated that it considered the reliability of Schultz's operating costs open to question. Schultz submitted no supporting evidence to corroborate his estimates. *See* Pepper *Schultz,* 3 FCC Rcd at 1202 ¶ 11. We therefore agree with the Board's finding that Schultz's showing is deficient in this regard. We note however, that the Board erred in one respect, in

finding that Schultz had not provided for certain items of studio equipment. Schultz indicated that he already owns this equipment. 4 FCC Rcd at 6399 ¶ 24; Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Att. G.

8. These findings indicate that Schultz's original staffing and financial proposals were deficient. Because Schultz's failure to formulate realistic proposal in the first place reflects a lack of diligence -- and because entertaining revised proposals at this time would be unduly disruptive -- Schultz has not demonstrated good cause to amend his financial and staffing proposals as he later sought to do. According, we adhere to our prior determination in this regard. Thus, Schultz is not qualified to be a Commission licensee.

II. COMSTOCK'S QUALIFICATIONS

9. After the remand, a new issue arose in this proceeding. The Board found that Comstock's principals violated the Commission's ex parte rules by soliciting a letter from [then] Nevada Senator Chic Hecht to the Presiding Judge. This letter expressed a preference for Comstock. Although the Board found that this violation had occurred, it concluded that, consistent with precedent, the violation was not disqualifying. We discern no error in the Board's reading of precedent.

10. As to an additional matter, however, the Board was deadlocked, in that the two members who constituted the panel deciding this case disagreed. In finding Comstock qualified to be a Commission licensee, the Board reversed the determination of Deputy Chief Administrative Law Judge James F. Tierney. *Pepper Schultz*, 4 FCC Rcd 2386 (I.D. 1989). While the panel agreed that the ex parte violation itself did not warrant disqualifying Comstock, they disagreed as to whether the ALJ made an additional finding that Comstock's principals engaged in potentially disqualifying lack of candor. Chairman Joseph Marino believed that the ALJ made such a finding, whereas Member Norman B. Blumenthal believed that he did not.

11. The dispute involves the following from the ALJ's initial decision:

> Messrs. Carroll and Akert [Comstock's principals], both declining to seek "information" on the status of this proceeding from the most likely source, their counsel, throughout this

> protracted case, chose, instead, contracting the Senator's Office, *were greatly less than candid and forthright* choosing, rather than acknowledging "the obvious fact that a prohibited *ex parte* presentation has occurred." to affirmatively deny any such thing took place, this despite other conduct in evidence [,] Carroll's admission at hearing, among others, that in his letter to the Senator he attempted to point out the merits of the Comstock case and the flaws in Schultz's; taking into account Comstock's admitted wrongdoing as, at most, "an isolated instance," this is trifling with the truth and reprehensible.

4 FCC Rcd at 2396-97 ¶ 94 (emphasis added).

12. We agree with Member Blumenthal that the ALJ's remarks are inadequate to constitute a conclusion that disqualifying lack of candor occurred. The conclusion is not supported by any findings of fact indicating any specific statements or instances of concealment that the ALJ considered to constitute lack of candor. Indeed, at one point during the hearing, the ALJ commented to Carroll: "Of course, you've answered the questions on cross-examination honestly for [Schultz's counsel]." Tr. 474. Thus, the language indicates that the ALJ was faulting Comstock for being unrepentant and arguing against the weight of the evidence -- as opposed to finding that its principals attempted to deceive the Commission as to a material matter of fact. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983).

13. Because the ALJ, before whom the testimony took place, did not add a lack of candor issue or make specific findings concerning a lack of candor, we will not pursue this matter further. We see no basis to act where specific, substantial questions have not been raised.

III. ORDERS

14. ACCORDINGLY, IT IS ORDERED,That the Petition for Leave to File Reply filed October 12, 1989 by Comstock Broadcasters, Inc. IS DENIED,[4] and, pursuant to 47 C.F.R. § 1.115(g), the Application for

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[4] Replies in connection with applications for review of Review Board decisions are not authorized by the Commission's rules. 47 C.F.R. § 1.115(f). Comstock's reply (continued...)

Review filed September 13, 1989 by Pepper Schultz IS DENIED and the contingent Application for Review filed September 18, 1989 by Comstock Broadcasters, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[4](...continued)
seeks to supplement its arguments with respect to the ex parte issue. The pleadings already filed, however, adequately address this matter.

OTHER APPENDED MATERIALS

CONSTITUTION

Of The

UNITED STATES Of AMERICA

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts, shall as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, Compensation, which shall not be diminished during the Continuance in Office.

SECTION 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFIED LIST OF ITEMS IN THE RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 90-1318

Submitted by Roberta L. Cook,
Counsel.

Federal Communications Commission
Washington D.C.

August 9, 1990

The following 0000XX pages are excerpts from a brief titled

On Appeal from Orders of the
Federal Communications Commission

Joint Appendix

_____ (Page 000001)

PLEADINGS FILED BEFORE HEARING DESIGNATION ORDER

6/21/82 Petition to Deny the application of Red Rock Broadcasting Corp. (Red Rock) filed by Pepper Schultz (Schultz)

6/24/82 Opposition to Petition to Deny, filed by Red Rock.

9/13/82 Amendment, filed by Red Rock.

10/21/82 Amendment, filed by Comstock Broadcasters, Inc.

12/27/82 Petition for Leave to Amend and the accompanying amendment, filed by Red Rock.

7/12/83 Petition for Leave to Amend, filed by Schultz.

7/15/83 Request for Additional Time to respond to Schultz's 7/12/83 Petition for Leave to Amend.

8/3/83 Opposition to Petition for Leave to Amend of Schultz, filed by Comstock Broadcasters, Inc. (Comstock)

8/11/83 Reply to Opposition to Petition for Leave to Amend, filed by Schultz.

8/11/83 Opposition for Petition for Leave to Amend, filed by Red Rock.

8/15/83 Affidavit of Publication, filed by Schultz.

8/19/83 Reply to Opposition for Petition for Leave to Amend filed by Schultz.

8/23/83 Motion to Strike Schultz's Reply to Opposition for Petition for Leave to Amend, filed by Red Rock.

8/23/83 Letter from the Federal Aviation Administration to Schultz, in reference to FAA clearance.

8/30/83 Opposition to Motion to Strike, filed by Schultz.

8/30/83 Petition to Deny the application of Comstock, filed by Schultz.

(Page 000002)

9/1/83 Motion for Extension of Time to respond to Schultz's Petition to Deny, filed by Comstock.

9/8/83 Opposition to Motion for Extension of Time, filed by Schultz.

9/9/83 Motion to Dismiss the application of Red Rock, filed by Schultz.

9/9/83 Motion to Dismiss the application of Comstock, filed Schultz.

9/12/83 Request for Extension of time to respond to Schultz's Petition

to Deny and Motion to Dismiss, filed by Red Rock.

9/14/83 Reply to Schultz Opposition to Motion for Extension Time, filed by Comstock.

9/15/83 Motion to Strike Schultz's Motion to Dismiss, filed Comstock.

9/20/83 Opposition to Request for Extension of Time of Red Rock, filed by Schultz.

9/28/83 Opposition to Petition to Deny and Motion to dismiss, filed by Comstock.

10/7/83 Reply to Opposition to Petition to Deny and Motion to Dismiss, filed by Schultz.

10/8/83 Opposition to Petition to Deny and Motion to Dismiss, filed by Red Rock.

10/13/83 Reply to Opposition to Petition to Deny and Motion to Dismiss, filed by Schultz.

10/14/83 Motion to Strike Schultz's Reply to Opposition to Petition to Deny and Motion to Dismiss, filed by Comstock.

10/19/83 Opposition to Motion to Strike, filed by Schultz.

_____ (Page 000003)

Before the (Starting page 000055)
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of

Pepper Schultz	MM Docket No. 83-1206
Comstock Broadcasters, Inc.	MM Docket No. 83-1207

For construction for
a new FM radio station in

Sparks, Nevada

To: Deputy Chief Administration Law Judge
James F. Tierney

MOTION FOR LEAVE TO AMEND

Pepper Schultz, an applicant in the above captioned proceeding, files herewith, by his attorneys, his motion for leave to amend his application to provide new information concerning his financial qualifications and his staffing proposal.

By Memorandum Opinion and Order released on January 28, 1985 (FCC 85R-5), the Review Board remanded this proceeding for a supplemental Initial Decision on the following new issues:

> To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and
>
> To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

This amendment is being filed within less than thirty days of the specification of these issues, and is designed to cure the problems which

they raise. By analogy to Section 73.3522 (b)(2) of the Rules[1], the present amendment may therefore be filed as a matter of right.

Moreover, the criteria specified in Erwin O'Conner Broadcasting Co., 22 FCC 2d 140 (Rev. Bd. 1970) have been met[2].

A. Mr. Schultz has acted with due diligence: The Commission has

> "made clear that this factor is not controlling where the amendment is intended to cure a disqualifying defect." (Family Broadcasting Group, 53 RR2d 662, 666 (Rev. Bd. 1983).

However, Mr. Schultz has nevertheless acted with due diligence, because the amendment is being filed within less than thirty days of the specification of the issues to which it is responsive. Those issues were added by the Review Board sua sponte, following the grant of Mr. Schultz's application by the Presiding Administrative law Judge's Initial Decision released on July 30, 1984 (FCC 84D-49).

B. The proposed amendment is not required by the voluntary act of Mr. Schultz: Previously, there had been no need for Mr. Schultz to provide detailed information in his application concerning either his financial qualifications or his staffing proposal. The need to do so first arose with the specification of the new issues by the Review Board, a matter over which Mr. Schultz had no control whatever.

Even if for some reason it were to be held that this part of the Erwin O'Conner Broadcasting Co., supra test has not been met, the

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[1] Section 73.3522(b)(2) provides:

> "In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order is published in the Federal Register, or by a date certain to be specified in the Order."

[2] The Review Board's remand order commented that an amendment filed by Mr. Schultz in response to questions raised by members of the Review Board at the oral argument did not meet the good cause requirements of Edwin O'Conner Broadcasting Co., supra. The present amendment is completely different and , as shown in text, does meet those requirements as well as the spirit of Section 73.3522(b)(2) of the Rules.

Commission has held that it is not applicable in the present situation

> "In Anax, the Commission reversed an ALJ's disqualification and dismissal of an applicant which had tendered an amendment to its financial proposal after the technical deadline had passed for such amendments. While not abandoning its traditional 'good cause' requirement for untimely amendments which go to basic qualifying issues, the Anax Commission stated that it has "not required a showing that an amendment is occasioned by an involuntary or unforseen act in cases where the amendment tends to remove a disqualifying defect and confers no comparative advantage.' 87 FCC 2d at 488-489 (footnote omitted). Moreover, the Commission has 'held that the due diligence requirement should be interpreted in light of the equities of the case, especially where a proffered amendment is intended to cure a disqualifying defect.' Id., at 489 (footnotes omitted)." Washington's Christian Television Outreach, Inc., 56 RR 2d 1539, 1546 (Rev. Bd. 1984).

C. No modification or addition of issues will be necessitated: The present amendment includes a completely new financial proposal and a completely new staffing proposal, responsive to the newly specified issues. It shows that Mr. Schultz has the necessary funds in his savings account to construct the station, to hire sufficient employees to operate on a twenty four hour per day basis from the beginning, and to operate for three months without regard to revenues. It also shows that he will have a cushion of in excess of $33,000. It is therefore, submitted that acceptance of the present amendment will in fact cure the problems raised by the newly specified issues, and will in no way necessitate the modification or addition of issues.

D. The amendment will not disrupt the orderly conduct of the hearing or necessitate additional hearings: Since the amendment is being filed promptly, its acceptance will facilitate the prompt completion of the hearing rather than the reverse.

E. The other party will not be unfairly prejudiced: The present amendment has no impact on the comparative aspect of this case, and

is intended merely to establish that Mr. Schultz is legally qualified to construct and operate his proposed facility. Its acceptance can have no prejudicial impact whatever on Comstock, which has no vested interest in the disqualification of Mr. Schultz, see Azalea Corp., 31 FCC 2d 561, 563 (1971).

F. Mr. Schultz will not gain a competitive advantage: As noted above, the present amendment goes only to Mr. Schultz's absolute qualifications; it has nothing to do with the comparative aspect of this proceeding.

CONCLUSION

In view of the above, it is submitted that acceptance of Mr. Schultz's amendment is consistent with the teaching of Erwin O'Conner, supra, and is required by the equities of this case. It is, therefore, respectfully requested that the amendment accompanying this Motion be accepted.

Respectfully submitted,

Pepper Schultz

By /s/ Herbert D. Miller Jr.

Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

His Attorneys

February 22, 1985

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of

Pepper Schultz — **MM** Docket No. 83-1206

Comstock Broadcasters, Inc. — **MM** Docket No. 83-1207

For construction for
a new FM radio station in

Sparks, Nevada

To: Deputy Chief Administration Law Judge
James F. Tierney

AMENDMENT

The above captioned application of Pepper Schultz is hereby amended to provide the associated financial and staffing information.

Respectfully submitted,

/s/ Pepper Schultz

Date 2/21/85

FINANCIAL AND STAFFING PROPOSAL

I. Costs of Construction

1. Mr. Schultz intends to purchase the below listed used equipment from KYOU(FM), in Greely, Colorado, for $15,000 cash:

1 Harris FM 5H3 FM 5KW Transmitter
1 Harris TE-3 FM Stereo Exciter
1 Harris FMC-12B Antenna, vertical and horizontal polarization
1 Mosley SCA Generator, 67 KHz

1 Spare Final Tube
300 feet of 1 5/8" Transmission line and fittings
Various spare parts

The equipment is currently in use by KYOU(FM) and will be replaced in mid March when KYOU(FM) increases power. A copy of a letter from the chief engineer of KYOU affirming the availability of the equipment is provided in Attachment A to this amendment[1]. According to information received from O'Brien's World Wide Moving and Storage, in Reno, Nevada, the cost of transporting the equipment from Greely will be $993.00. A copy of a letter from O'Brien's is provided in Attachment B to this amendment.

2. The following equipment will be obtained from Broadcast Services Company, in Sparks, Nevada, for $17,961.05 plus shipping charges of $200.00:

1 FM Monitor
1 Stereo Monitor
1 2 bay antenna
1 EBS E/D
1 STL system
1 remote control
Miscellaneous connectors, etc.

A letter from Broadcast Services Company setting forth the availability of this equipment is provided in Attachment C to this amendment.

3. Auxiliary power equipment will be acquired from Nevada Generator Systems, in Sparks, Nevada at a cost of $4,975 plus freight ($317.76) and taxes ($298.50). A copy of a letter affirming the availability of the equipment is provided in Attachment D to this amendment.

4. Installation services will be performed by Broadcast Services Company, in Sparks, Nevada, at a total cost of $1130. A letter from Broadcast Services Company affirming its willingness to perform installation services is provided in Attachment E to this Amendment.

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[1] This letter, as well as other documents being submitted herewith bearS handwritten notations made by Mr. Schultz.

5. Electrical wiring and fuse panel will cost $1,500, and telephone installation charges will be $244.00.

Mr. Schultz's total construction costs will therefore amount to $42,619.31.

6. $21,320.40 is presently owed in respect of past legal services. This amount is being paid off at the rate of $200.00 per month, by making payment of $600.00 each third month. Mr. Schultz and counsel have agreed that no legal fees beyond these amounts will be paid until after completion of the third month of station operation.

II. Operating Costs

1. The proposed transmitter site will be rented for $300.00 per month. Studio and office space in Sparks will also be rented for $300.00 per month. Five[2] monthly rental payments will, therefore, amount to $3,000.

2. Telephone service will cost $66.60 per month. Assuming that four monthly payments will have to be made prior to the end of the third month of operation, total telephone costs will be $266.40.

3. Electric power costs, assuming operation 24 hours per day, 30 days per month, with a 10 KW load, will be $622.20 per month[3]. Three months' electricity charges will, therefore, amount to $1881.60.

4. Office supplies for a three month period will cost approximately $1,100.00.

5. The following employees will be hired:

3 full time announcers @7.50 per hour = $3,600 per month

1 full time secretary/traffic person @ $7.50 per hour = $1,200.00 per month

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[2] Availability of the leased space for the two months preceding the commencement of operation will facilitate construction.

[3] There will, in addition, be a one time only charge of $15.00.

6 part time announcers @ $7.50 per hour = $1,440.00 per month.

Mr. Schultz will be the Chief Engineer.

It is estimated that payroll and associated costs will amount to $6,240.00 per month or $18,720.00 for the first three months of station operation.

Total operating costs for the first three months will, therefore, amount to $24,968.00.

III. Total Construction and Operating Costs

In view of the above, it is apparent that total construction and initial operating costs will amount to $67,587.31.

IV. Availability of funds

As shown in the letter from First Federal Savings, of Reno, Nevada, provided in Attachment F, Mr. Schultz has savings on deposit in excess of $101,000, subject to withdrawal by him at any time. Aside from the obligation for legal fees referred to above, Mr. Schultz has no liabilities. The funds on deposit at First Federal Savings will be used exclusively for construction and initial operation of the proposed radio station.

V. Mr. Schultz is financially qualified

Since Mr. Schultz's costs will amount to $67,622.60 and he has cash on hand in excess of $101,000 he has a cushion of in excess of $33,000. He is, therefore, financially qualified to construct and operate the proposed facility.

Attachments A - F and Certificate of Service omitted.

PARTIAL TRANSCRIPT of PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:

RED ROCK BROADCASTING
CORPORATION, et al. Docket No. MM83-1205
Spark, Nevada

DATE: March 27, 1984 PLACE: Washington, D.C. VOLUME: II
PAGES: 16 - 93

(p. 16)

The above-entitled matter came on for hearing, pursuant to notice, before Judge James F. Tierney, Presiding Administrative Law Judge, at 2000 L Street, N.W., Courtroom No. , Washington, D.C., at 9:55 a.m.

On Behalf of Pepper Schultz:

HERBERT D. MILLER, JR
Koteen and Naftalin

On Behalf of Comstock Broadcasters, Inc

DAVID M. HUNSAKER
DENISE B. MOLINE
Putbrese and Hunsaker

DIRECT EXAMINATION
Pepper Schultz

(p. 48)

BY MR. HUNSAKER:

Q Thank you, your Honor. To refresh your recollection of the question, Mr. Schultz, I ask you if you had given any thought to ultimately how many employees would be working for you on a full-time basis?

A None.

(p. 61)

BY MR. HUNSAKER:

Q Mr. Schultz, do you have any present plans, that's right now -- I'm assuming that your application is granted -- of selling the construction permit or built station, or the majority of stock in it to anyone?

A I do not.

(p. 93) (Whereupon, at 12:05 p.m., the hearing was adjourned.)

PARTIAL TRANSCRIPT of PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:

In Re Applications Of:

PEPPER SCHULTZ Sparks, Nevada	MM DOCKET NO. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS, INC. Sparks Nevada	MM DOCKET NO. 83-1207 File No. BPH-820628AQ

DATE: December 12, 1984 PLACE: Washington, D.C. VOLUME: III
PAGES: 94 - 145

(p. 94)

The above-entitled matter came on for Review Board, pursuant to notice, before Review Board Chairman Joseph A. Marino, and review Board Members Michael Blumenthal and Jerold L. Jacobs, at 2000 L Street, Northwest, Courtroom Number 2, Washington, D.C., at 10:00 a.m.

On Behalf of Pepper Schultz:

HERBERT D. MILLER, ESQUIRE
Koteen & Naftalin

On Behalf of Comstock Broadcasters, Inc.:

DAVID M. HUNSAKER, ESQUIRE
DENISE B. MOLINE, ESQUIRE
Putbrese & Hunsaker

(Pepper Schultz present at hearing in Washington, D.C.)

(p. 103)

MR. JACOBS: But didn't Mr. Schultz have a response to your 24-hour allegation? He doesn't concede that he's going to have to --

MR. HUNSAKER: He plans -- he reported --

MR. JACOBS: He doesn't concede that he's going to have to be awake 24 hours a day.

MR. HUNSAKER: He plans to be out on the street selling 20 hours a day. That's one. The rules, I believe, and I think the Board can take judicial notice of the rules of the Commission, specify he must have an operator on duty at all times that the station is operating.

Mr. Schultz has indicated that the station is going to be on the air, from the beginning, for 24 hours a day.

CHAIRMAN MARINO: But that's a staffing problem. That's not -- you know, maybe I'm -- and I don't want to rely on common law pleading, because I think there's a basic fairness requirement in our procedures....

(p. 111)

MR. JACOBS: But the sticking point for the ALJ seemed to be primarily that Mr. Akert would remain a director of the company.

MR. HUNSAKER: The ALJ had two sticking points. One I just think he's absolutely wrong on. And that's the one about voting trusts per se have something inherently wrong with them. And I've addressed that in the brief.

On the directorship, you know, I have to ask the Board to look at the facts. I also point to the court's decision in the Cleveland television case, where they looked at the testimony of, I think, the proposed general manager. He said our purpose, the purpose of the agreement was to insulate control, to have these people have really nothing to do with the operation of the station, the Malwright people.

And the court noted that there was no refutation of that testimony. You have Mr. Carroll testifying clearly that Mr. Akert is not going to have control --

CHAIRMAN MARINO: But those gentlemen weren't going to be directors of the corporation.

MR. HUNSAKER: That is true.

CHAIRMAN MARINO: And I just, you know, I can't analytically put this case together. You set up a corporation usually to create certain legal relationships. And one of the stockholders, directors, officers -- now, director, in corporate law in general, is a fairly important concept of control. A director does control. Then you superimpose on it a trust to take away that control that stock ownership and directorship gives them? What kind of a, what kind of a legal animal do we have here to analyze?

MR. HUNSAKER: I'm not sure I understand the thrust of your question, Mr. Chairman.

MR. JACOBS: Well, it seems like the fact that he remains a director counteracts, if you will, the fact that he entered into a voting trust. One confers authority, and one takes away authority. How can you do both at the same time?

MR. HUNSAKER: By the testimony that's in the hearing, that he really isn't going to perform any significant role as director, that's one. And I think you have to look at that.

MR. BLUMENTHAL: Well, let me ask you this question. You present us with, as Mr. Jacobs points out, an impossible dilemma to deal with in the law. The law in most states presumes that the directors are in control of the corporation, they're the ones that are looked to to control the corporation. Directors are elected by stockholders, and the Commission recognizes the fiction that directors are in control of the station as we do with our non-stock entity cases. They're in control. Notwithstanding, you enter into an agreement with a voting trust that, in a sense, pierces your own corporate veil and tells us that it's nonsense, that your directors are not in control of this station.

If we licensed you, who would be in control of this station, legally? Who would legally be in control of this station?

MR. HUNSAKER: Mr. Carroll.

MR. BLUMENTHAL: Mr. Carroll would be in legal control? Not the directors of Comstock Broadcasters, Inc.? Who are they?

(p. 115)

MR. BLUMENTHAL: What did he, aside from jimmying-up his integration score since he was a 51 percent owner, he didn't need voting control over the stock to constitute a majority, is that correct?

MR. HUNSAKER: That's correct.

MR. BLUMENTHAL: So he just added a little gimmick here to jimmy-up the integration credit.

MR. BLUMENTHAL: What Commission policy requires a 49 percent stock owner?

MR. HUNSAKER: Well, not a requirement, sir, but a policy that says, we encourage the, you know -- the policy statement says we encourage the people with the voting control to be in the day-to-day management. Since Mr. Carroll had voting control and was going to operate the station, and Mr. Akert was in essence a passive investor who had no interest in operating this station --

MR. BLUMENTHAL: Can a director be a passive investor?

MR. HUNSAKER: This is for you to decide. We are arguing on the basis of the facts of this case, yes. And for two reasons. One, Mr. Carroll already has voting control. And number two, the testimony unrefuted on the record as to what Mr. Akert's role would be.

MR. JACOBS: But it may be unrefuted in terms of testimonial evidence, but isn't it correct that the bylaws suggest a greater role which might in fact balance the testimony?

MR. HUNSAKER: I don't know whether the bylaws are on the record, so I can't really reply to that.

MR. BLUMENTHAL: In other words, you're saying that it's a small corporation, two-man, and that these two men are not going to pay strict attention to such things as written bylaws and legal documents.

MR. HUNSAKER: If you mean if they're going to disobey the

documents, I will not say that.....

(p. 119)

MR. BLUMENTHAL: ....But I have two questions, either of which could get the Board out of this preposterous case. One, why should we not remand this case to hearing on a staffing issue which appears, prima facie, to raise substantial and material questions of fact? And the second questions is, B, why should we not certify the question of whether or not a director with non-voting stock is in control, or vice-versa, or neither?

(p. 120)

MR. BLUMENTHAL: Do the Commission's rules require that you have a licensed operator on duty at the transmitter at all times?

MR. MILLER: They require -- no. They require that you have a licensed operator on duty somewhere, at a remote control point, or present at an extension meter. You have to have somebody who is capable --

MR. BLUMENTHAL: And Mr. Schultz, of course, proposes to have somebody?

MR. MILLER: Himself, initially.

MR. BLUMENTHAL: In other words, then, he is going to be on duty, presumably awake, 24 hours a day, for the indefinite future?

MR. MILLER: No, I think not. He did testify that he was planning to operate the station 24 hours a day. He did testify that that was his intention during the first month or two of operation. What he didn't testify, because there was no reason for him to do so, there being no issue, was that he could, even though he doesn't plan to have any employees initially, he can get help. I'm sure he has friends who can help him out --

MR. BLUMENTHAL: Well, that's not on the record.

MR. MILLER: It's not on the record, because there's no issue.

(p. 122)

CHAIRMAN MARINO: Mr. Miller, -- there are precedents in Pike and Fish, or FCC, on what is an adequate staffing proposal -- and this case comes close to being on the line of raising that type of an issue. Because the Board members are obviously asking you --

MR. BLUMENTHAL: The only way he could come closer is if he proposed absolutely no staff; there being nothing really between zero and one.

MR. MILLER: Well, he proposes himself.

CHAIRMAN MARINO: Does the law help you? Do we have precedents that say you can do it with one?

(p. 123)

MR. MILLER: -- you can find that, if he has difficulties, as he may, he's going to be very busy, he can get friends to help him --

MR. BLUMENTHAL: Did he say that?

(p. 125)

MR. BLUMENTHAL: Let me ask you this question. The Commission, to your knowledge, has not said we will never have a staffing issue, is that correct?

MR. MILLER: Had the staffing issues been sought, we would have responded to the motion to enlarge issues, I think successfully, and the staffing issue would not have been had. Had the staffing issue been added, we could have put on evidence along the lines which I have just suggested.

No staffing issue was sought. None was added. And it wasn't approached, because it wasn't at issue.

(p. 130)

MR. MILLER: ....he voluntarily turned it in.

(p. 131)

MR. BLUMENTHAL: Well, I hope he's got money for a supplementary hearing.

(p. 138)

MR. BLUMENTHAL: Because if not, I think what you might do is invite Mr. Hunsaker to sit down and see if you can settle this case amongst the two remaining applicants on some amicable basis, using non-voting stock. Perhaps Mr. Schultz could be a director and he would only have to work part-time. And the other man could give him 49 percent, his 49 percent, but it entitles him not to vote or do anything else. And you guys could have a wonderful time out there together in Nevada, passing paper back and forth.

(p. 139)

MR. JACOBS: Well, Mr. Miller, if Comstock had proposed a staffing issue, once Mr. Schultz testified, would you have had any grounds to oppose that motion?

MR. MILLER: Certainly. We would have responded by saying how Mr. Schultz proposes to operate during this start-up period. I assume we would have pointed out that he could, if he wished, operate fewer than 24 hours a day. He doesn't have to operate on Sundays at all. He could get friends to help him. He could --

MR. BLUMENTHAL: But that's not what he said.

MR. MILLER: But there was no reason for him to explore this point --

MR. BLUMENTHAL: He didn't have to explore.

MR. MILLER: -- because there was no issue.

MR. BLUMENTHAL: ....Either he intends to operate 24 hours a day, seven days a week, and do it all himself as a sole employee, or he's going to come in and tell another story. In which case we've got him testifying against himself, leaving us to ponder whether or not his testimony is credible in either event.

(p. 141)

MR. BLUMENTHAL: ....somebody has non-voting stock, we say you're not in control. But to take that same man and then make him a director of a corporation over which he presumably has no control is mindless.

MR. HUNSAKER: The sequence of events, Board Member Blumenthal, is just the reverse.

MR. BLUMENTHAL: I think we understand the sequence of events. No matter what sequence you put them in, whether you make him a director first and then take away his voting stock, or vice versa, you create an absolute sham of any sort of control situation. Do you understand?

Either we give your man, either we give recognition to the voting stock and find that your board of directors is not in control of the corporation, or we find that your board of directors is in control of the corporation but that your non-voting stock member --

(p. 142)

MR. HUNSAKER: I think you're mistaken with respect to record evidence. The only issue raised by Schultz was the actual legal fact of being a director. We can't do anything about that, because the B cut-off date has passed.

CHAIRMAN MARINO: There's nothing, there's nothing --

MR. HUNSAKER: We can't make them resign at this point because, you see, Mr. Schultz would, perhaps legitimately himself --

CHAIRMAN MARINO: But there is nothing in the record that they won't vote, that it doesn't have to come to that, because these people, or these two gentlemen are very close, and that they'll manage by consensus anyway?

MR. HUNSAKER: That, by the way, is simply not -- the record really doesn't support that they're very close. The only business connection was the advertising agency connection. And that's going to be divested. So that --

(p. 143)

MR. JACOBS: I think Comstock has to understand that there may be difference between corporate law and Commission integration proposal law.

Certainly under corporate law, if you have a corporation, you must have I believe at least two stockholders, two directors.

PARTIAL TRANSCRIPT of PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of the
re Applications of:

PEPPER SCHULTZ
Sparks, Nevada

MM Docket No. 83-1206
MM Docket No. 83-1207

COMSTOCK BROADCASTERS, INC.
Sparks, Nevada

DATE: April 9, 1985 PLACE: Washington, D.C. VOLUME: V
PAGES: 163 - 254

(p. 163)

The above-entitled matter came on for hearing, pursuant to notice, before Judge James F. Tierney, Presiding Administrative Law Judge, at 2000 L Street, N.W., Courtroom No. 1, Washington, D.C., 20554, at 10:02 a.m.

On Behalf of Pepper Schultz:

HERBERT D. MILLER
Koteen & Naftalin

On Behalf of Comstock Broadcasters, Inc.:

DAVID M. HUNSAKER
Putbrese & Hunsaker

CROSS EXAMINATION
Pepper Schultz

(p. 197)

BY MR. HUNSAKER

Q. ----

A. Eight hours per month is what I believe I mentioned before

for engineering duties.

Q. And selling, I believe you indicated previously 20 hours per week, is that correct?

A. That is correct, minimum.

Q. How often would you expect to be a fill-in announcer?

A. I hope I don't have to. I am hiring these people to do it.

(p. 220)

BY MR. HUNSAKER:

Q. Mr. Schultz, I will repeat the question for you. At the time of your original intention, whenever that was, was it your expectation that you would have no hired help but would be relying on help provided by friends at no charge?

A. No. When I went into this, I was geared up to thinking that I could completely automate the station with no employees. I was not going to hire friends at that time.

Q. When? Can you place this in time for us?

A. When I submitted my application.

Q. Initially that was what, October '81?

A. In '81, and again sometime in '82, six months after that. I felt that I could do it by the rules, the ATS rules, and then in the rules it said something about an informal letter. I was probably going to try to ask permission to do this, complete automation without employees, and even possibly go and have an alarm system or something like that do the monitoring. But there is a statement about you can write a letter to the FCC, an informal letter requesting any change or something of that nature?

Q. Some sort of waiver? Is that what you are referring to?

A. I guess it would be called a waiver.

Q. When you say fully automated with an ATS, you envisioned a taped system, I take it, with music and talk or whatever. Commercials, everything would be computerized or whatever so that it would run itself?

A. Yes.

Q. Was that your original intention?

A. Yes.

Q. When did that intention change, if I could get time frames on that?

A. After I went before the review board, they indicated strongly that there would be issues in regards to my time, I believe, and there was a very strong indication that they were going to remand me back to the administrative law judge.

So I made an amendment I believe at that time, or a brief, to try to get out from having the remand process. So I took an avenue, and I went to some of my friends to get them, I asked them if they would help me out, and they said that they would, on staffing of the station.

So I was just trying to correct a possible deficiency, which I didn't know if it would come true or not at the time. It did come true, and then I had to take another avenue at that time and do what I am currently doing at the present time.

(p. 223)

MR. HUNSAKER: Your Honor, what I was really getting at is, I wanted to make sure I understood the basis for this latest amendment. I believe I understood Mr. Schultz to say it was in response to the remand order.

JUDGE TIERNEY: Yes.

BY MR. HUNSAKER:

Q. If that is not the case, Mr. Schultz, please tell us otherwise.

A. That is the case. When I got that, I decided to amend my application for the new issue that I now presently have. it was not an

issue before.

Q. Yes. That is understood, Mr. Schultz.

REDIRECT EXAMINATION
Pepper Schultz

(p. 239)

BY MR. MILLER:

Q. When you were proposing -- strike that.

When you were thinking of using automated equipment, did you have in mind relying on any knowledge that you have gained from correspondence courses?

A. Yes.

Q. What sorts of correspondence courses?

A. Correspondence courses on computers. I took one in digital techniques and interfacing. Those two, I know those quite well.

Q. How were you planning to apply this knowledge to automation?

A. To know what kind of equipment to buy to run the station as far as billing, selecting the proper tape machines, the commercials, and also transmitter parameters that are supposed to be operated in.

Q. Were you going to write any of your own programs or build any of your own equipment?

A. No. A friend of mine was going to do that under contract.

Q. But it is no longer your intention to rely on this sort of equipment?

A. Correct.

Q. Or friends?

A. Correct.

MR. MILLER: Your Honor, I think that is it for me.

PARTIAL TRANSCRIPT of PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: Docket No. 83-1206

SPARKS, NEVADA

DATE: November 15, 1988 PLACE: Washington D.C. VOLUME VIII
PAGES: 331 - 483

The above-entitled mater came on for Hearing, pursuant to Notice, before the Honorable JAMES F. TIERNEY DEPUTY CHIEF Administrative Law Judge, at 2000 L Street, N.W., Courtroom Number 1, Washington, D.C., on Tuesday, November 15, 1988, commencing at 10:00 a.m.

APPEARANCES:

On behalf of Pepper Schultz:

HERBERT D. MILLER, JR., ESQ.
Koteen & Naftalin

On behalf of Comstock Broadcasters, Inc.:

DAVID M. HUNSAKER, ESQ.
Putbrese & Hunsaker

(Pepper Schultz was present at hearing in Washington, D.C.)

CROSS EXAMINATION
William B. Akert

(p. 354)

BY MR. MILLER:

Q Good morning Mr. Akert.

A Good morning.

Q Referring to the second paragraph of your written testimony, who called the meeting?

A Bob Carroll called me on the telephone and told me that he had some bad news and identified what it was. That as far as the original conversation, and that was sometime in early Spring -- it says March here.

He called to tell me that we had this problem. And at that time, I became rather unhappy. I blew up a little. Told him that I was disgusted with the whole situation and that we'd been going for eight years and that I thought we should do something about it.

Q Is the meeting referred to in paragraph 2 of your direct testimony, was it a meeting on the telephone or was it a meeting in person?

A I think within a week there -- I can't really recall. I do business with Mr. Carroll, Bob Carroll. He's and advertising agent. That's our association. He does advertising for me. And it might have been head on; it might have been over the telephone. I can't really recall.

I remember becoming very aggravated to the fact that this application is bogged down in bureaucracy. And it started out to be just a minor investment and it's developed into a capital investment and we haven't stuck a stick in the ground. And I just blew up and I suggested -- it was my suggestion that we contact the Senator or member of the Cabinet or somebody to see what the heck is happening to us.

And I just felt that we were like a dog chasing our tail, going around in circles.

(p. 355)

Q Did Mr. Carroll tell you by whom he had been informed about the Commission remand?

A I don't know if he got the message from counsel or from somebody else. I really can't tell you that.

Q What -- so you don't recall whether he told you he got it from counsel or he got it from somewhere else?

A No, I can't recall.

Q Did you have any question -- did you ask Mr. Carroll any questions about the proceeding?

A No. Prior to that time we had won all our appeals. We felt like we had it. And it was a matter of time that we'd get it. And then, it became a turnaround. And I really hadn't thought too much about it.

And when it came about and due to the time and the investment, like I said, the investment started from a small investment to a capital investment. And I just sort of blew up with Bob and that's how all this all got started.

Q You testified a few moments ago that you suggested that someone in Congress be contacted. Why did you suggest that?

A Well, I was tired of the time lapse. Otherwise -- it started at the application of eight years. And I came into it strictly as an investment. And nothing had happened.

We hadn't stuck a stick in the ground in eight years and it was just pure frustration on my part. I've never done anything like this, so I don't know exactly what I'm doing, but I've got other things that took a heck of a lot less time.

Q Well, what did you conceive might be the result of contacting a member of congress?

A I wanted to see where we were at in our destination. I wasn't sure if I was getting a run around by my attorney; I wasn't sure if I was getting a run around by Bob Carroll. And I really didn"t know where I was at. I was completely frustrated.

Q Did you make any effort to contact Comstock's attorney to ask him questions?

A No. In fact, I've never called the attorney in all the time we've done business with him.

Q Did you ask Mr. Carroll any questions about the proceeding for any purpose?

MR. HUNSAKER: Excuse me, Your Honor. Could counsel just clarify the time period in question?

MR. MILLER: Well we're focusing on this meeting which occurred in March or April of 1988....

(P. 360)

Q ....

A Well, I think in all honesty, I was questioning Bob Carroll's credibility, my counsel's credibility, and the bureaucracy itself. As a businessman, I can't understand why it's taken eight years to get an FM station in Sparks, Nevada, one way or another.

(p. 365)

Q Are you acquainted with a Mr. Newman?

A Dave Newman; yes.

Q Who is Mr. Newman?

A He's a manager of a radio station in Reno, Nevada; an FM station and AM station.

Q Was he present at the meeting that you referred to in paragraph 2 of your direct testimony?

A He was -- I think he was at the meeting where we talked over a squawk box with counsel.

(p. 366)

Q Why was Mr. Newman invited to participate in that conversation with counsel?

A He's a personal friend of Bob's. He's been very successful in the area of business. I think he owns one of his own stations in Northern California or Washington or somewhere.

Q And Mr. Carroll, of course, knew that he was present during that conversation with counsel?

A Yeah. Three of us were in one room talking over a squawk box. I remember that.

(p. 369)

THE WITNESS: I see Mr. Newman once a week at a businessman's breakfast. And sometimes I sit at his table; sometimes I don't. And we have casual conversation. And sometimes it about costs and sometimes it's about our radio station. But it's so casual that it wouldn't be remembered.

BY MR. MILLER:

Q Well, I ask you again. Do you recall any other conversations with Mr. Newman that focused on this proceeding, and particularly your frustrations following the remand which occurred in the Spring of this year?

A Nothing particular, no.

Q But you recall a conversation concerning contacting a member of Congress?

A I initiated that.

Q Yes, sir. Was Mr. Newman present when you initiated that?

A No. This was between Bob Carroll and myself, and it was out of the sheer frustration that it had been going along this long. And then he said that it was going back to the Judge. I felt like we're going to start back all over again and go through the same procedure again.

And that's why I was frustrated. And I said, let's get ahold of somebody in Washington and find out where we're going.

Q So that was a separate get together than the time when you and Mr. Newman and Mr. Carroll --

A That's right. It could have been Bob talked to me on the phone, or else he could have come over with the information. But I know that I was frustrated and I can't remember if it was even on the telephone or head on.

Q Do you recall which of these sessions occurred first?

A I image Bob notifying me that -- I'm sure it was on the

telephone that he notified me that the appeal board had turned it back to the Judge.

Q And then sometime after that, you and Mr. Newman and Mr. Carroll visited with Mr. Hunsaker on the telephone?

A That's right.

(p. 371)

Q No. I'm speaking of during the conversation among you, Mr. Carroll, Mr. Newman and Mr. Hunsaker.

A I think that conversation was after the fact that we'd found out about our situation. I'm thinking that. And I think it was what we had to look forward to; what we had to do.

Q What situation is this?

A That the letter had been wrote.

Q Oh, after the addition of the ex parte issue that we're gathered together here for, you're talking about?

A Right: yeah.

(p. 373)

BY MR. MILLER:

Q That's only five months ago; less than five months ago. Do you have any recollection at all as to what was said by anyone during that discussion?

A Not really, no. I don't know how to explain myself to you. Like I say, this is -- I keep a datebook on my desk of all the things I do from day to day and my future dates. I've got all my golf dates, business appointments and stuff. I doubt -- and I keep them going back for five years. I doubt if there's ever Comstock Broadcasting (sic) written in there for appointments or dates or anything like that. It's just not that important to me.

And the only other thing that I keep is a checkbook. And it shows where I wrote a check to Comstock Broadcasting (sic) to pay the bills. And then it goes into his account and he pays the bills.

And 90 percent or 98 percent of the business transactions of Comstock Broadcasting (sic) is done with counsel and I'm not in on it. I've never called counsel myself. Bob is running the show and that's why he's there. I'm just an investor.

And the meeting of Newman and myself and Bob Carroll was in an office that he had and I remember us going into a special room so that we could use the squawk box and have a three or four-way conversation. I can't even remember if it was before or after.

I think if counsel would have that information and could put and end this.

(p. 376)

Q And is that 5/9/88 telephone conversation the one that you've been testifying about previously, which was also participated in by Mr. Newman?

A It must have been. I think that's the only one that I made with counsel over this.

Q You had expressed great frustration during your earlier meeting with Mr. Carroll during the status of this proceeding and had suggested that a letter be written to member of Congress; had you not?

A Yes.

Q This May 9 telephone conversation was a month or two later. Did you at that time know whether Mr. Carroll had written his letter to Senator Hecht?

A I think I did. I think -- now, I'm just thinking. I initiated it. I called Mr. Farr who is a personal friend of mine that works for Senator Hecht. He was out of town. He did not return the call and Carroll carried it forward. It slipped my mind and Carroll carried it forward from there.

It was the only thing that I did in the whole thing there.

Q Did the subject of Mr. Carroll's communication with a member of Congress come up during the May 9, 1988 telephone call among you, Mr. Carroll, counsel and Mr. Newman?

A Like I said, I can't recollect.

(p. 384)

JUDGE TIERNEY: I see. Now, you have described yourself as just purely an investor here; is that right?

THE WITNESS: Yes.

JUDGE TIERNEY: And you are -- for lack of a better term -- a 49 percent minority shareholder; is that right?

THE WITNESS: Yes.

REDIRECT EXAMINATION
William B. Akert

(p. 387)

BY MR. HUNSAKER:

Q Based upon your recollection now, Mr. Akert, do you know when you came to know that Bob Carroll had written a letter to Senator Hecht? Do you know what time?

A Not a direct date....

Q Okay. If you recall this meeting that Mr. Miller kept asking you about, the meeting that took place on May 9th on the squawk box and so on, do you know whether of not you knew at that time Mr. Carroll had written a letter to Senator Hecht?

A Yeah. If it's May -- that says May. I had to know about it by May that he'd wrote it, because I was the one that instigated it, so I'm sure that the letter went off. And it had to be by that time that I knew that the letter --

Q Did he copy you on that letter?

A No.

Q How did you come to find out that he had written the letter?

A He told me.

Q Okay. Do you recall anything about that conversation?

A Not that much. I thought that it was good that the letter was written and in fact, I was fairly well impressed that Senator Hecht acted as fast as he did; that he'd got started.

Q Now, how did you know that Senator Hecht --

A Because information that we broke the law or that there was an irregularity came back very fast.

CROSS-EXAMINATION
Robert Carroll

(p. 398)

BY MR. MILLER:

Q Did you make any suggestions to counsel as to what he ought to do in response to this matter?

A No. We may have, again, offered to settle. I think we've made that offer several times. And I'm sure I said let's see if maybe there's a settlement on the horizon.

(p. 399)

Q Yes, sir. But in your direct testimony you say it was inconceivable that the Commission could not have made a final ruling one way or the other.

Aside from the fact that you thought you ought to win, why was it inconceivable that the Commission itself couldn't have made --

A I guess I --

Q Let me finish my question.

A Okay.

Q -- that the Commission itself couldn't have resolved this matter instead of sending it back to the Judge?

A I guess I'm predicating that on the fact that, you know, the time frame, 1982, the first time that we filed, talking about a Class A radio station in a rather small section of the country and, you know, with regard to the big picture. And it was inconceivable to me that they could not rule and make a ruling in this thing after four, five, six years.

(p. 404)

Q ----

A I had no idea. But I know, you know, as a resident of the state of Nevada, you ask your congressional delegation for help. And sometimes they're able to provide answers to you.

I was really looking for and answer as to when this thing might be over, one way or the other, and I was -- I did that at the urging of -- not the urging but the conversations with my partner who at that point, I thought, was asking a legitimate business question; is this ever going to be over.

Q Well, did you -- what did you think that the Congressman or the Senator would do?

A I didn't know. I didn't know, but I didn't think it would hurt to ask. And I was even advised that by some other broadcasters, as you know, in the market. That it can't hurt to ask.

Q Well, did you have -- did you believe that a Senator would be able to get information on this proceeding that was not available to your attorney?

A I might have believed that, or his staff or something.

(p. 407)

Q Why did you discuss contacting an elected representative with David Newman?

A I discussed this case frequently with Dave Newman, who's my best personal friend and who runs a couple of radio stations in Reno. And he's followed the station from day one. In fact, he's the one that urged me to file for this radio station.

Just in passing -- oh, I guess I told him that Mr. Schultz was getting and opportunity to go back again to the Commission. And I said, I just wonder if, you know, we could get any more information through Chic Hecht or Harry Reed or Barbara Bukanovich (ph), our congressional delegation.

And he said, hey, it wouldn't hurt to ask, or words to that effect. Now, he said, this is incredible. He said this thing shouldn't be going on this long -- nonsense, is what he said.

(p. 411)

Q Why did you think Mr. Hunsaker might take offense at that?

A Oh, I don't know. Kind of going around him to some degree, you know, trying to find out some information. Like we don't have faith in him to bring us all the information that's available.

And I don't know what Mr. Hunsaker"s caseload is, Mr. Miller. I don't know what yours is. I don't know how hard he's working for Comstock Broadcast (sic) each and every day or what his requirements are.

I mean, I service 10 client in my business and I work hard for some of them and not so hard for others. And I think I had a legitimate request from a partner who does not understand the broadcasting business who, you know, in effect, said, hey, how much longer is this thing going to go on. You know, fun's fun, but we're into this thing now.

Q When Mr. Newman told you that contacting a Senator or Congressman about the case, quote, "certainly could not hurt," did he do so in response to a question?

A No, a statement. I said, you know, we've got to move this thing off track, or something like that. I said, I think I'm going to, you, know, try to contact Barbara Bukanovich's office see if they can find out when it might come to an end. And I think I used Barbara Bukanovich as an example and at that time didn't even mention Chic Hecht. And he said it certainly couldn't hurt.

Q Did he say it might help?

A No, he didn't.

Q Well, did he encourage you to do it or did he discourage it, or did he--

A I think he encouraged me by the tone of his, you know, of his -- of the conversation.

Q Did Mr. Akert tell you what he thought might be accomplished by contacting a member of Congress?

A Nope. He did not.

Q But it was his idea to do it; wasn't it?

A Yes.

(p. 414)

A Well, I thought we were -- I waited this long because I honestly saw the sunshine over the clouds. I thought, you know, any day now we're going to get this thing, or it's going to be resolved. And I'm to the point now -- I was to the point six months ago where I -- I don't care how it gets resolved, but let's just resolve it.

Q And then the remand came?

A Right.

(p. 417)

Q You say, "I assumed at the time that she needed the information to make any appropriate inquiries." Are you making the distinction there between appropriate inquiries and inappropriate --

A Well, appropriate to me is what do they fell is appropriate to this case. I mean, is it calling somebody at the FCC; is it trying, you know, looking at - you know whatever they thought was appropriate.

That was very vague conversation, by the way. But that was a telephone conversation with Ms. Duke that day. And she asked me something about is the docket number, something something. And that's all I remember about that conversation.

Q You say, "Ms. Duke did not indicate to me that the Senator was intending to write the Judge."

Now it was your view, though, at that time that there would have been absolutely nothing wrong with her writing to the Judge or the Chairman or anyone else; is that correct?

A I guess it was my view I didn't think about it one way or the other. I had no idea what action they were going to take.

Remember that Mr. Farr said, write a letter; tell us what your problem is. And, you know, it was a very routine conversation. I'm sure it was a conversation he'd had with 20 other constituents that day.

So, I wrote the letter.

(p. 420)

Q Have you received any advice from counsel as to your conduct generally during this proceeding; as to not to do things without seeking prior advice of counsel?

A No, not really. Other than he informed me about the ex parte rule and said that's a no-no.

Q After the fact?

A After the fact; yes.

(p. 423)

Q You state in paragraph 7 that you were unaware up until I received a copy of Schultz' motion that there was any rule or law against contacting one's Congressman or Senator, and so forth.

Well, didn't you and Mr. Hunsaker have a telephone conversation about this very matter on May 23rd?

A We had a telephone conversation, yes, where he informed me that there was a rule, you know, the ex parte rule.

Q Well, that preceded your receipt of Mr. Schultz' motion, did it not, sir?

A I guess it did.

Q It would have to have. Mr. Schultz' motion was filed on May 23rd and served by mail. And Mr. Hunsaker could not have received it except until May 24th at the earliest. And if he Federal Expressed it to you, you couldn't have received it until May 25th; isn't that correct?

A Okay. Uh-huh.

Q So your statement is wrong to the extent that you say you were unaware up until I received a copy of Schultz' motion, that this was not proper; isn't that correct?

A That's Correct.

Q Mr. Hunsaker told you about that when he telephoned you to say that he had received some correspondence from Mr. Minkel at the FCC?

A That's true.

Q What did Mr. Hunsaker tell you that led you to believe at that time that there was a rule or law against contacting one's Congressman or Senator while involved in a FCC --

A If that's the conversation that I think you're referring to, he told me that a letter had been sent from Senator Hecht's office to Judge Tierney, and that that was against the law and that he felt sure that Mr. Schultz' would try to make some kind of an added situation.

Q Well, did he tell you that there was a rule or law against simply contacting one's Congressman or Senator while involved in a FCC hearing?

A No, I think he explained that a third party could not get involved period with the FCC.

Q But he didn't tell you that it was improper to write a letter to your Congressman; did he? You could write a letter to your Congressman complaining about the weather in Nevada; couldn't you?

A He implied that what we'd done was wrong. And I don't remember the exact verbiage of that conversation.

Q Well, do you know what it was that was wrong?

A That we tried to get a third party involved, in going, in finding out some information from the FCC.

(p. 451)

Q At the bottom of paragraph 5, you state that you didn't anticipate that the Senator or his staff would write directly to Judge Tierney or attach your letter to his own. What did you anticipate?

A I had no idea. I was really waiting for them to say, okay, we need to do this. You either need to come in and see the Senator or we're going to turn this matter over to one of his staff. It was strictly a starting point based on, conversation with Mr. Akert and his interest as a stockholder to attempt to get some more information. And it was really no more than that.

(p. 453)

Q Without contacting the Judge, how did you anticipate that the Senator could get information on when the judge was likely to rule?

A I had no idea. I know that Washington works in strange ways and I'm not privy to all the information that goes on here.

(p. 457)

Q According to your testimony, then, Ms. Duke, during your telephone conversation following receipt of your letter, gave you no indication whatever as to what Senator Hecht was going to do?

A No. I did not know who she was at the time. And from the recollection of the conversation, it had something to do with the docket number. She recited a docket number and said is that the docket number.

And I looked at some correspondence that David had sent me recently and confirmed that that was.

(P. 477) (Whereupon, the witness was excused from the witness stand.)

(p. 481)

JUDGE TIERNEY: On the record. And I'll try to paraphrase, at least, the last procedural matters that were agreed between counsel and the Presiding Judge.

In the event there will be need for proposed findings and proposed conclusions of Law, that would be in the absence of a settlement or compromise, proposed findings and conclusion will be filed on or before January 13, 1989.

Statement of Facts

PEPER v. FORDYCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Argued November 17, 1886. - Decided December 13, 1886

If the jurisdiction of the Circuit Court of the United States does not appear on the face of the record, in some form, the decree is erroneous and must be reversed.

A, a citizen of Arkansas, conveyed to B, a citizen of the same State, real estate in Arkansas, in trust to secure the payment of notes due to C, a citizen of Missouri, with power of sale in case of non-payment. Subsequently A became insolvent and assigned his property to D, a citizen of Arkansas, in trust for the benefit of his creditors. *Held*, that, in proceedings in equity commenced by D to determine the amount of indebtedness from A to C, and to prevent the sale of the trust property by B, and to obtain a cancellation of the conveyance to B on payment of the amount found due to C,B was a necessary party, with interests adverse to D; and as both were citizens of the same State, and as the jurisdiction of the Circuit Court depended alone upon the citizenship of the parties, it was without jurisdiction. *Thayer v. Life Association of America*, 112 U. S. 117, affirmed.

When a decree or judgment of a Circuit Court is reversed for want of jurisdiction in that court, this court will make such order in respect to the costs of appeal as justice and right may seem to require. *Mansfield, &c., Railway v. Swann*, 111 U.S. 379, and *Hancock vs. Holbrook*, 112 U.S. 229, followed.

From the record in this case it appeared that on the 10th of January, 1881, Walter A. Moore, a citizen of Arkansas, conveyed to George G. Latta, a citizen of the same State, certain property in the city of Hot Springs, in trust to secure the payment of three notes for the sum of $2433.46 each, payable to the order of Charles G. Peper, under the name of Charles G. Peper & Co., a citizen of Missouri, with power of sale in case of non-payment. After the execution of this conveyance

Moore became insolvent, and assigned his property to Samuel W. Fordyce, a citizen of Arkansas, for the benefit of his creditors. On the 11th of June, 1881, Fordyce as such assignee, at the instance of the creditors of Moore and in their behalf,

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began a suit in equity in the Circuit Court of the United States for the Eastern District of Arkansas against Peper and Latta, the object and purpose of which was to prevent a sale of the property under the deed to Latta, and for an account of certain transactions between Peper and Moore connected with the notes which had been secured, with a view to the cancellation of the debt, or at lest its payment after the exact amount due should be determined. In the bill it appeared that both Fordyce and Latta were citizens of Arkansas, and that Peper was a citizen of Missouri. To this bill Peper and Latta filed a joint answer.

Afterwards, on the 31st of October, 1881, Fordyce, as assignee, and Moore began another suit against Peper and Latta in the Circuit Court of Garland County, Arkansas, the object of which was also to enjoin Peper and Latta from selling the property under the deed to Latta, and to obtain a cancellation of the conveyance. Immediately on the filing of this bill, a preliminary injunction was granted as prayed. On the same day, Peper and Latta filed a petition for the removal of this last suit to the Circuit Court of the United States for the Eastern District of Arkansas, on the ground that "there is a controversy in this suit between citizens of different States, and which can be fully determined between them." In their petition it was stated in express terms that Latta, Fordyce, and Moore were all citizens of Arkansas, and Peper a citizen of Missouri. This cause was entered in due form in the Circuit Court of the United States on the 14th of November, 1881, and on the 21st of the same month Peper and Latta filed in that court a joint answer to the bill which had been filed in the State court, and on which the injunction had been granted. On the 20th of December, 1881, the two causes thus in the Circuit Court of the United States were there consolidated on motion of Fordyce, and an order made "that the two causes be tried as one suit under the title" of the cause originally begun in that court.

On the 10th of June, 1882, Peper and Latta filed a cross-bill in which they prayed a foreclosure and sale of the trust property. To this cross-bill an answer was filed by Fordyce and

Moore, setting up substantially the same defenses as were shown in the bill of Fordyce in the Circuit Court of the United Sates, and to this a replication was filed by Peper and Latta. Testimony was taken, and on the final hearing of the cause a Testimony was taken, and on the final hearing of the cause a decree was entered dismissing the cross-bill and directing a cancellation of the deed of trust. From that decree Peber and Latta took this appeal

Mr. Henry Hitchcock for appellants.

Mr. Eben W. Kimball (Mr. George W. Murphy was with him) submitted on their brief.

Mr. Chief Justice Waite, after stating the case, delivered the opinion of the court

The first objection now made to the decree is, that the Circuit Court had no jurisdiction, either of the suit originally begun in that court, or of that removed from the Sate court. If the jurisdiction does not appear on the face of the record in some form, the decree is erroneous and must be reversed. That was decided at the present term in *Continental Life Ins. Co. v. Rhoads,* ante, 237, to which reference is made for the authorities.

The jurisdiction in this case depends alone on the citizen ship of the parties; and in the suits as originally begun, and on their consolidation in the Circuit Court, Latta, one of the defendants, is, and was at the commencement of the actions, a citizen of the same State with the plaintiffs. This is fatal to the jurisdiction, because Latta was an indispensable party adverse in interest to the plaintiffs, and there was no separable controversy between the plaintiffs and Peper which would authorize the removal of the suit begun in the State court on that account. This was expressly decided in *Thayer v. Life Association of America,* 112 U."S. 717, a case which cannot be distinguished from this. It follows, therefore, that the decreed must be reversed.

It only remains to consider the question of costs; for in *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swann,*

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111 U.S. 379, and *Hancock v. Holbrook,* 112 U.S. 229, it was held that, upon a reversal for want of jurisdiction in the Circuit Court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require. Here the error is attributable equally to both the parties. Fordyce sued originally in the Circuit Court, when, upon the face of his bill, it appeared there was no jurisdiction. Without discontinuing that suit he sued again in the State court upon what was substantially the same cause of action, and to obtain substantially the same relief. This suit Peper and Latta caused to be removed to the Circuit Court, and in their petition set forth a state of facts which showed that the case was not removable. The cause was then entered in the Circuit Court, and an answer and a cross-bill filed by Peper and Latta without any attempt on the part of Fordyce or Moore to have the suit remanded, and without even calling the attention of the court to the question of jurisdiction. On the contrary, after the answer and before the cross-bill, Fordyce moved for and obtained an order that the two cases—that which he had brought in the Circuit Court of the United States and that which Peper and Latta had removed there—be heard as one under the title of his own suit in that court. The cases then proceeded, without objection by either party, until after a final decree below and an appeal by Peper and Latta to this court. Under these circumstances, we order that the costs of this court be divided equally between the parties, each paying half.

The decree of the Circuit Court is reserved for want of jurisdiction in the Circuit Court, and the cause remanded, with instructions to dismiss the bill filed originally in that court by Fordyce against Peper and Latta, without prejudice, and to remand the suit removed from the State Court, each party to pay his own costs in the Circuit Court.

Counsel for Parties.

FEDERAL COMMUNICATIONS COMMISSION

v.

SANDERS BROTHERS RADIO STATION.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 499. Argued February 9, 1940.—Decided March 25, 1940

1. A fundamental question as to the function and powers of the Federal Communications Commission was raised in this case and, on the record, is open here. P. 473.
2. Resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element which the Federal Communications Commission must weigh, and as to which it must make findings, in passing on an application for a broadcasting license. P. 473.
3. A licensee of a broadcasting station, over whose objection—of economic injury to his station—the Communications Commission granted a permit for the erection of a rival station, is, under § 402 (b) (2) of the Act, a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, and entitled to appeal therefrom. P. 476.
4. An order of the Communications Commission granting a permit to erect a broadcasting station held supported by the findings. P. 477.
5. The conclusion of the appellate court that the Communications Commission had not used as evidence certain data and reports in its files—which an intervening party had been denied an opportunity to inspect—accepted here. P. 478. 70 App. D.C. 297; 106 F. 2d 321, reversed.

Certiorari, 308 U.S. 546, to review a judgment which set aside an order of the Federal Communications Commission granting a permit to erect a broadcasting station.

Mr. William J. Dempsey, with whom *Solicitor General Biddle* and *Messrs. Richard H. Demuth, William, C. Koplovitz, Robert M. Cooper*, and *Benedict P. Cottone* were on the brief, for petitioner.

Mr. Louis G. Caldwell, with whom *Messrs. Reed T. Rollo, Donald C. Beelar,* and *Percy H. Russell, Jr.* were on the brief, for the respondent.

Mr. Justice Roberts delivered the opinion of the Court.

We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended.[1]

January 20, 1936, the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed with the petitioner an application for a construction permit to erect a broadcasting station in that city. May 14, 1936, the respondent, who had for some years held a broadcasting license for, and had operated, Station WKBB at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to move its transmitter and studios to the last named city and instal its station there. August 18, 1936, respondent asked leave to intervene in the Telegraph Herald proceeding, alleging in its petition, *inter alia,* that there was an insufficiency of advertising revenue to support an additional station in Dubuque and insufficient talent to furnish programs for an additional station; that adequate service was being rendered to the community by Station WKBB and there was no need for any additional radio outlet in Dubuque and that the granting of the Telegraph Herald application would not serve the public interest, convenience, and necessity. Intervention was permitted and both applications were set for consolidated hearing.

The respondent and the Telegraph Herald offered evidence in support of their respective applications. The respondent's proof showed that its station had operated

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[1] Act of June 19, 1934, c. 652, 48 Stat. 1064; Act of June 5, 1936, c. 511, 49 Stat. 1475; Act of May 20, 1937, c. 229, 50 Stat. 189, 47 U.S. C. 151, *et seq.*

at a loss; that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the respondent and that, of all the advertisers relied on to support the Telegraph Herald station, more than half had used the respondent's station for advertising.

An examiner reported that the application of the Telegraph Herald should be denied and that of the respondent granted. On exceptions of the Telegraph Herald, and after oral argument, the broadcasting division of petitioner made an order granting both applications, reciting that "public interest, convenience, and necessity would be served" by such action. The division promulgated a statement of the facts and of the grounds of decision, reciting that both applicants were legally, technically, and financially qualified to undertake the proposed construction and operation; that there was need in Dubuque and the surrounding territory for the services of both stations, and that no question of electrical interference between the two stations was involved. A rehearing was denied and respondent appealed to the Court of Appeals for the District of Columbia. That court entertained the appeal and held that one of the issues which the Commission should have tried was that of alleged economic injury to the respondent's station by the establishment of an additional station and that the Commission had erred in failing to make findings on that issue. It decided that, in the absence of such findings, the Commission's action in granting the Telegraph Herald permit must be set aside as arbitrary and capricious.[2]

The petitioner's contentions are that under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved, or whose interests were adversely affected, by the Commission's actions.

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[2] *Sanders Brothers Radio Station v. Federal Communications Commission*, 70 App. D.C. 297; 106 F. 2d 321.

within the meaning of § 402 (b) of the Act which authorizes appeals from the Commission's orders.

The respondent asserts that the petitioner in argument below contented itself with the contention that the respondent had failed to produce evidence requiring a finding of probably economic injury to it. It is consequently insisted that the petitioner is not in a position here to defend its failure to make such findings on the ground that it is not required by the Act to consider any such issue. By its petition for rehearing in the court below, the Commission made clear its position as now advanced. The decision of the court below, and the challenge made in petition for rehearing and here by the Commission, raise a fundamental question as to the function and powers of the Commission and we think that, on the record, it is open here.

First. We hold that resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.

Section 307 (a) of the Communications Act directs that "the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." This mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals.[3] The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station. Whether the Commission should consider the subject must depend

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[3] *Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 285.

upon the purpose of the Act and the specific provisions intended to effectuate that purpose.

The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission,[4] the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.[5] Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcast demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the cases of railroads,[6] in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measurers

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[4] See Title II, §§ 201-221, 47 U.S. C. §§ 201-221.

[5] See § 3 (h), 47 U.S.C. § 153 (h).

[6] Compare *Texas & Pacific Ry. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 277; *Chicago Junction Case*, 264 U.S. 258.

which are necessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the *Act* contemplates inquiry by the Commission, *inter alia,* into an applicant's financial qualifications to operate the proposed station.[7]

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

This is not to say that the question of competition between a proposed station and one operating under an

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[7] See § 308 (b), 47 U.S.C. § 308 (b).

existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives,[8] which Congress would to have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.

Second. It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application.

Section 402 (b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) "by any other person aggrieved or whose interests are adversely affected

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[8] See § 311, 47 U. S. C. § 311, relating to unfair competition and monopoly.

by any decision of the Commission granting or refusing any such application."

The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission it is impossible that § 402 (b) was intended to give the respondent standing to appeal, since absence of right implies absence of remedy. This view would deprive subsection (2) of any substantial effect.

Congress had some purposes in enacting § 402 (b) (2). It May have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.[9]

We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission.

Third. Examination of the findings and grounds of decision set forth by the Commission discloses that the findings were sufficient to comply with the requirements of the Act in respect of the public interest, convenience, or necessity involved in the issue of the permit. In any event, if the findings were not as detailed upon this subject as might be desirable, the attack upon them is not that the public interest is not sufficiently protected but only that the financial interests of the respondent have not been considered. We find no reason for abrogating the Commission's order for lack of adequate findings.

Fourth. The respondent here renews a contention made in the Court of Appeals to the effect that the Com-

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[9] Compare *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U.S. 14, 23-25.

mission used as evidence certain data and reports in its files without permitting the respondent, as intervenor before the Commission, the opportunity of inspecting them. The Commission disavows the use of such material as evidence in the cause and the Court of Appeals has found the disavowal veracious and sufficient. We are not disposed to disturb it conclusion.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

In The
SUPREME COURT OF THE UNITED STATES
At
OCTOBER TERM, 1946.

UNITED STATES *v.* PETRILLO

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 954. Argued May 5-6, 1947.—Decided June 23, 1947.

1. Section 506(a) (1) of the Communications Act, making it a crime, by the use or threat of use of force, violence, intimidation, or duress, to coerce, compel or constrain or attempt to coerce, compel or constrain a radio-broadcasting licensee to employ or agree to employ, in connection with the conduct of the licensee's broadcasting business, any person or persons "in excess of the number of employees needed by such licensee to perform actual services," is not so vague, indefinite or uncertain as to violate the Due Process Clause of the Fifth Amendment. Pp. 5-8.

(a) This question was properly presented to this Court for a decision on an appeal by the Government under the Criminal Appeals Act from a decision of a District Court dismissing, on the sole ground that the section was unconstitutional, an information charging a violation in substantially the statutory language. p. 5-6.

(b) The contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need, cannot be sustained. Pp. 6-7.

(c) When measured by common understanding and practices, the language of the statute provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress; and the Constitution requires no more. Pp. 7-8.

2. It does not contravene the Due Process Clause of the Fifth Amendment by denying equal protection of the laws to radio-broadcasting employees as a class—even though it provides no punishment for employers for violating the policy and leaves other classes of employees free to engage in the practices forbidden to radio workers. Pp. 8-9.

(a) This question was properly presented to this Court for a decision on an appeal by the Government under the Criminal Appeals Act from a decision of the District Court dismissing an information on the sole ground that the statue is unconstitutional as written. P. 8.

(b) It is not within the province of the Court to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Pp. 8-9.

3. On its face, the statue does not contravene the First Amendment by abridging freedom of speech; but, since the statute does not mention picketing and it is uncertain on the record in this case whether it would have been applied so as to prohibit peaceful picketing, the question whether such an application would violate the First Amendment is not before this Court in a form appropriate for decision. Pp. 9-12.

4. On its face, the statute does not violate the provisions of the Thirteenth Amendment prohibiting slavery and involuntary servitude; but no decision is made on the question whether some possible application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment, since questions of that kind are not presented by the record in this case in a form appropriate for decision by this Court. Pp. 12-13.

5. The Criminal Appeals Act does not require this Court to pass on constitutional questions prematurely decided by a district court's dismissal of an information which had not been tested by a motion to strike or for a bill of particulars. P. 10.

68 F. Supp. 845, reversed and remanded.

The District Court dismissed a criminal information charging respondent with violation of § 506 (a) (1) of the Communications Act, on the ground that the section was unconstitutional. 68 F. Supp. 845. On direct appeal by the Government under the Criminal Appeals Act, 18 U.S.C. (Supp. V, 1946) § 682, *reversed and remanded*, p. 13.

Assistant to the Attorney General McGregor and *Robert L. Stern* argued the cause for the United States With them on the brief was *Acting Solicitor General Washington.*

Joseph A. Padway and *Henry Kaiser* argued the cause for appellee. With them on the brief was *Herbert S. Thatcher.*

Mr. Justice Black delivered the opinion of the Court.

The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F. Supp. 845. The case is here on direct appeal by the Government as authorized by the Criminal Appeals Act. 18 U.S.C. (Supp. V, 1946) § 682. The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946. 60 Stat. 89. the specific provisions of the Amendment charged to have been violated read:

"SEC. 506 (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

. . . . . .

"(d) Whoever willingfully violates any provision of subsection (a) or (b) of this section shall, upon con-

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conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both." 60 Stat. 89.

The information alleged that a radio broadcasting company, holding a federal license, had, for several years immediately proceeding, employed "certain persons who were sufficient and adequate in number to perform all of the actual service needed . . .in connection with the conduct of its broadcasting business." The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services .."

The coercion was allegedly accomplished in the following manner:

> "(1) By directing and causing three musicians, members of the chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said license;
>
> "(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and
>
> "(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in

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terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment.[1] The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments.

Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in *Rescue Army v. Municipal Court*, 331 U.S. 549, 568, and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For "The Government's appeal does not open the whole case." *United States v. Borden Co.*, 308 U.S. 188, 193.

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition . . . ." The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the grounds of vagueness and indefi-

[1] Another ground, not argued here, was that the Act represents an exercise of power by Congress not delegated to the United States.

niteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case. *Cf. United States v. Thompson,* 251 U.S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and , sometimes, proof. *Rescue Army v. Municipal Court, supra; Watson v. Buck*, 313 U. S. 387, 402. *Borden's Company v. Baldwin,* 293 U.S. 194, 204, 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonable anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra,* and is ripe for our decision, we turn to the merits of the contention.

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Lanzetta v. New Jersey*, 306 U.S. 451. But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfulness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States*, 324 U.S. 282, 285-286. It would strain the requirement for certainly in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws v. United Sates*, 325 U. S. 91; *United Sates v. Ragen*, 314 U.S. 513, 522, 524, 525. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible stand-

ards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

Second. It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. This contention, raised by the motion to dismiss, and sustained by the District Court as a ground for holding the statute unconstitutional as written, is properly before us, and we reach this equal protection ground, for the same reason that we decided the question of whether the section was unconstitutionally vague and indefinite.

In support of this contention it is first argued that if congress concluded that employment by broadcasting companies of unneeded workers was detrimental to interstate commerce, in order to be consistent, it should have provided for the punishment of employers, as well as employees, who violate that policy.[2] Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. *See Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46.

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[2] The Act does not prohibit radio broadcasters from voluntarily hiring more employees than they need.

Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co. v. Davis,* 301 U.S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attached.

Third. Respondent contends here, and the District Court has held, that the statute abridges freedom of speech my making peaceful picketing a crime. It is important to note that the statue does not mention picketing, peaceful or violent. the proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing. Rather it comes from the information's charge that respondent attempted to compel the licensee to hire unneeded employees by placing "a picket in front of the place of business of [the] . . . licensee." Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment. In ruling on this motion, the District Court assumed that because "there [was] in this case no charge of violence . . . the placing of a picket must be regarded . . .as peaceful picketing." From this assumption, it concluded that "the application [of the statute] here sought to be made violates the First Amendment by its restriction upon freedom of speech by peaceful picketing." Thus, rather than holding the statue as written to be an unconstitutional violation of the First

Amendment, the District Court ruled on the statue as it was proposed to be applied by the information as it then read.

We consider it inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advance of the necessity to do so. And the provisions for direct appeal from District Courts of certain criminal cases do not require us to pass on constitutional questions prematurely decided by a district court's dismissal of an information.

The information here, up to the place where it alleges the use of particular coercive means, charges in substantially the language of the statute that respondent coerced the licensee. The information's charges up to this point constitute a sufficient basis for a challenge to the statue on the ground that it contravenes the Constitution. Whether this part of the information, or the information as a whole, was adequate definitely to inform the respondent of the nature of the charge against him is another questions. *See United States v. Lepowitch*, 318 U.S. 702, 704; *Potter v. United States*, 155 U.S. 438; *cf. United States v. Hess*, 124 U. S. 483. Had the District Court postponed ruling on the First Amendment question raised by the motion to dismiss, or had it denied the motion, respondent could have sought a bill of particulars, apart from attacking the constitutionality of the Act. See *Husty v. United States*, 282 U.S. 694, 702; *Bartell v. United States*, 227 U. S. 427, 433-434; *Dunbar v. United States*, 156 U.S. 185, 192. So also, if the additional allegations describing the means used to accomplish the proscribed purpose were not definite enough for the court to determine whether they were sufficient in law to charge an offense, and if such allegations were not mere surplusage, see *United States v. Socony-Cacuum Oil Company*, 310 U.S. 150, 222, a challenge could have been

made to the information, see *United States v. Hess, supra,* at 487-488, as distinguished from a challenge to the statute on which it rested. In that event, and upon a holding of insufficiency of the information, appeal by the United States would have properly gone,under the Criminal Appeals Act, *supra,* to the Circuit Court of Appeals, and if inappropriately brought here, that Act, as amended, 56 Stat. 271, would have required us to transfer the cause to the Circuit Court of Appeals. But no such challenge was made to the information.

We therefore have a situation in which we are urged to strike down a statute as violative of the constitutional guarantees of free speech when the statue has not been, and might never be, applied in such manner as to raise the question respondent asks us to decide. For the gist of the offense here charged in the statute and in the information is that respondent "wilfully, by the use of force, intimidation, duress *and* by the use of other means, did attempt to coerce, compel and constrain"[3] the licensee to hire unneeded employees. If the allegations that this prohibited result was attempted to be accomplished by picketing are so broad as to include action which either is not coercive, compelling or constraining, within the statute's meaning, or could not be constitutionally held to be, the trail court would be free, on motion of the respondent, to strike the particular allegations if they are surplusage. Rule of Criminal Procedure, § 7 (d). Or the Government might amend the information "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." *Ibid.* § 7 (e).

The foregoing analysis shows that we are asked to rule on constitutional questions that are not yet precisely in issue. The question as it was decided by the District

[3] Italics supplied.

Court was not the question raised by the motion to dismiss—whether the statute is invalid on its face—but whether it is invalid as it is proposed to be applied. And even if our decision could be evoked upon a showing that the statute certainly, but for our intervention, would have punished respondent for peaceful picketing, there is no such certainty here. No final issue had been drawn. The information was still subject to amendment to fit, within the permissible area of amendments, the type of coercive means developed by further pleading or proof. See *Borden's Co. v. Baldwin, supra,* at 213. Further pleadings and proof might well draw the issues into sharper focus making it unnecessary for us to decide questions not relevant to determination of the constitutionality of the statute as actually applied. Thus this case had not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statue in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment.

Fourth. The District Court held, and it is argued here, that the statue, as sought to be applied in the information, violates the Thirteenth Amendment which prohibits slavery and involuntary servitude. This contention is also rooted in that part of the information which particularizes the means by which respondent attempted to compel action by the licensee, *i.e.*, by causing three musicians to discontinue, and three musicians not to accept employment. The argument is that employees have a constitutional right to leave employment singly, see *Pollock v. Williams,* 322 U.S. 4, 17, 18, or in concert, and con-

sequently that respondent cannot be guilty of a crime for directing or causing them to do so. For the reasons given with reference to the picketing specification, therefore, we consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amended is a question we shall not pass upon until it is appropriately presented.

Reversed and remanded.

Mr. Justice Douglas took no part in the consideration or decision of this case.

Mr. Justice Frankfurter, concurring.

I agree with the Court's judgement and opinion because it holds that the Lea Act is not beyond the power of Congress to regulate commerce. I desire, however, to add a few words.

The constitutional basis for the legislation is the same as that upon which the validity of the Sherman Law rests. It is too late in the day to require argument or citation of cases in support of the right of Congress to free interstate commerce from obstruction that the exertion of monopolistic power may entail or from interference that may reasonable be deemed to promote monopoly. Equally clear is it that Congress may direct its legislation specifically towards a disclosed evil, without generalizing its prohibition, when in its judgement like evils have not disclosed themselves elsewhere. It would be a usurpation of the legislative authority for us to find that there was no basis in reason for the judgement of Congress that the public interest called for legislation to deal with what is colloquially called "feather-

bedding" in connection with the broadcasting business. Beyond that, it is not our province to go.

The District Court took a different view, and on defendant's motion dismissed this information on the ground that the statute is unconstitutional. 68 F. Supp. 845. Since the Court now holds that the statute is constitutional, the case goes back to the District Court.

The Court conjures up difficulties which I do not share. The case is here under the Criminal Appeals Act of 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U.S.C. (Supp. V., 1946) § 682, whereby a direct review can be had of a district court judgment setting aside an indictment or information, if the decision of the district court is based "upon the invalidity or construction of the statute upon which the indictment or information is founded." Our decisions have construed this to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute. A criminal case cannot be reviewed here if questions of criminal pleading—defects not arising from the statue under consideration—enter into a decision sought to be reviewed. See *United States v. Hastings*, 296 U. S. 188, 192, 194; *United States v. Borden Co.*, 308 U.S. 188, 193; *United States v. Swift & Co.*, 318 U.S. 442. If both the sufficiency of criminal pleading and the validity or construction of the underlying statute were in issue before the District Court, and views as to both were interwoven in the court's decision, this Court has no jurisdiction to entertain the appeal. Under the Act of May 9, 1942, it must remand the cause to the appropriate circuit court of appeals. On the other had, if the question of constitutional construction was the isolated ground of decision by a district court dismissing a federal prosecution, that is the only question to be considered here and it must be considered within the scope given it by

the district court. Other questions may be imbedded in the case which may eventually come to the surface. But they are not brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading, and to statutory or constitutional questions not passed upon by a district court, that Mr. Chief Justice Hughes had reference when he said, "The Government's appeal does not open the whole case." *United States v. Borden Co., supra,* at 193.

There is no complication in the record before us to an exercise of our jurisdiction under the Criminal Appeals Act. The District Judge's decision is wholly free from any ruling involving criminal pleading. He stated precisely what he deemed to be the sole issue before him and which alone he decided: "The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated." 68 F. Supp. at 850.

We, therefore, have no acknowledgement or intimation by the District Judge that he had any difficulty with the information as a matter of pleading, or that it carried any ambiguities which he resolved one way rather than another. If that were so, we would have no jurisdiction to review his decision. The District Court found constitutional defects in the statute "as it was written by Congress." We find the contrary. Therefore, the information should go back to the District Court for disposition. Just as we cannot go behind a district court's determination regarding the sufficiency of the indictment as a matter of pleading as a preliminary to passing on statutory validity, so when a naked question of validity is presented to us, it is not for us to scrutinize the charge and hypothesize possibilities whereby new questions may arise of a statutory or constitutional nature.

Mr. Justice Reed, dissenting.

I dissent from the opinion and judgment of the Court. My reason for disagreement is that § 506 (a) (1) of the Communications Act is too indefinite in its description of the prohibited acts to support an information or indictment for violation of its provisions. My objection is not to the words in the first paragraph of § 506 that make unlawful in labor matters the use of threats, force, violence, intimidation or duress against an employer. There is a background of experience and common understanding that ordinarily gives such words, when used in criminal statutes, sufficient definiteness to acquaint the public with the limits of the proscribed acts. When such words are used, they place upon those affected the risk of estimating incorrectly the sort of action that my ultimately be held to violate the statutes. *Nash v. United States*, 229 U.S. 373.

My objection is to the indefiniteness of the statutory description of the thing for which force must not be used—that is, "to compel" a licensee under the Communications Act "to employ . . .any person or persons in excess of the number of employees needed by such licensee to perform actual services."

This criminal statute is the product of legislation directed at the control of acts deemed evil by Congress. It is one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain practices in the field of economics that seemed contrary to the public interest.[1] These statues made new crimes. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common expe-

[1] Emergency Price Control Act, 56 Stat. 33, § 205 (b), 50 U.S.C. App. (Supp. V, 1946) § 925 (b); Fair Labor Standards Act, 52 Stat. 1069, § 16 (a), 29 U.S.C. § 216 (a); National Labor Relations Act, 49 Stat. 456, § 12, 29 U.S.C. § 162; Federal Corrupt Practices Act, as amended, 57 Stat. 167, § 9, 50 U.S.C. App. (Supp. V, 1946) § 1509.

rience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitations on conduct, a more precise definition of the crime is necessary to meet constitutional requirements.[2]

Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the state. A statute is invalid when "so vague that men of common intelligence must necessarily guess at its meaning." 269 U.S. at 391. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are "needed" to perform actual services" in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?

The Government seeks to avoid the difficulty by interpreting the section. Their brief says, after considering the legislative history, "the bill was not intended to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done . . . . If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act

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[2] *United States v. Cohen Grocery Co.*, 255 U.S. 81; *Cline v. Frink Dairy Co.*, 274 U.S. 445; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Connally v. General Construction Co.*, 269 U.S. 385. See *Gorin v. United States*, 312 U.S. 19, 26.

as one to prevent extortion, as distinct from *bona fide* demands relating to conditions of employment." This interpretation seems to me to fly in the face of § 506 (1). There is another subsection to which the language might apply.[3] This clearly defines the prohibited acts. If the Congress wishes to fix the maximum number of employees that a licensee may employ in stations of various sizes, it may, of course, be done. Or, if it is impractical for Congress to act because of the varying situations, the number may be left to regulations of the Federal Communications Commission or other regulatory body.

This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid.

Mr. Justice Murphy and Mr. Justice Rutledge join in this dissent.

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[3] 60 Stat. 89, § 506 (a) (4):

"to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; . . . "

THE COMMUNICATIONS ACT OF 1934 WITH AMENDMENTS AND INDEX THERETO

RECAPPED TO JANUARY 1969

(Contains to packets 1 through 5)

(and the Administrative Procedure Act, the Judicial Review Act, and selected sections of the Criminal Code pertaining to Broadcasting)

TITLE V——PENAL PROVISIONS——FORFEITURES

COERCIVE PRACTICES AFFECTING BROADCASTING

NOTE: § 506. Repealed. Pub. L. 96-507, § 1, Dec. 8, 1980, 94 Stat. 2747

Section, act June 19, 1934, ch. 652, title V, § 506, as added Apr. 16, 1946, ch. 138, 60 Stat. 89, prohibited certain coercive practices affecting broadcasting and provided penalties for violations.

Sec. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or

(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or

(5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

(b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—

(1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(2) to accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental operation, use, or maintenance, if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(3) to pay or agree to pay any exaction on account of the broadcasting, by means of recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligations heretofore or hereafter incurred or assumed.

(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than

$1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted.

CODE OF FEDERAL REGULATIONS
Telecommunication 47
Part 70 to 79
Revised as of October 1, 1984

§ 73.346 Automatic transmission system monitoring and alarm points.

(a) Each FM broadcast station operating an automatic transmission system shall be provided with one or more ATS monitoring and alarm points. A station employee holding at least a Restricted Radiotelephone Operator Permit shall be on duty at one such point at all times when the station is in operation. The ATS monitoring and alarm point location may be at the transmitter site, the main studio, an authorized remote control point, or at another authorized location. If the licensee wishes to establish an ATS monitoring and alarm point other than at the station transmitter, main studio, or an authorized remote control point, an informal request is to be submitted to the Commission in Washington, D.C. with a description of the location of the point and stating the basis for its selection. All ATS monitoring and alarm points shall be under the control of, or available to, the licensee at all times. Provisions shall be made so that unauthorized persons can not activate the transmitting system from such points.

(b) The following ATS controls or alarm functions shall be installed at each ATS monitoring and control point to be utilized:

(1) A means to turn the transmitting apparatus on and off at all times.

(2) An off-air receiver for monitoring the station's program signal and any subsidiary communications transmitted by means of multiplex subcarriers.

(3) An aural alarm signal as specified in paragraph (c) of this section.

(c) An aural alarm at the ATS control and monitoring point shall activate in event of any of the following conditions:

(1) The transmissions of the station are interrupted for a period exceeding three minutes.

(2) The transmitter output power falls below 90% of the authorized

value to be used if not automatically corrected within 3 minutes.

(3) An alarm that would indicate any failure of the tower lighting equipment unless arrangements are made for visual observations of the condition of the tower lighting as required in § 17.47 (a) of this chapter.

(d) In addition to the aural alarms specified in paragraph (c) of this section, the licensee may install visual alarms or signals, and alarm circuits indicating other conditions at the transmitter site provided that there can be recognition between the required alarm signals and those not required.

(e) Whenever a required alarm condition occurs, the alarm signal must remain continuously activated until the condition causing the alarm is corrected or manual control of the transmitting is assumed, provided that if a visual alarm is also provided, the aural alarm may be turned off if the visual alarm remains activated.

(f) The station employee on duty at the ATS monitoring and alarm point is not restricted to a specific duty position provided that such person can monitor the off-air signal and alarm signal at all times. If that employee is the only person in attendance at the station, that person must also be able to observe and respond to an EBS alert as required by Subpart G of this part.

(g) The station employees on duty at ATS monitoring and alarm points shall be fully instructed in procedures to take in the event of a malfunction of the transmission system and receipt of an EBS alert.

(h) Station and operator licenses shall be posted at each ATS monitoring and alarm point according to the provisions of § 73.1230.

[42 FR 1240, Jan. 6, 1977, as amended at 48 FR 28456, June 22, 1983; 48 FR 38479, Aug. 24, 1983]

CODE OF FEDERAL REGULATIONS
Title 47, PARTS 70 - 79
Revised as of October 1, 1990

§ 73.1500 Automatic transmission system (ATS).

An automatic transmission system consists of monitoring devices, control, and alarm circuitry, arranged so that they interact automatically to operate a broadcast station's transmitter and maintain technical parameters within licensed values.

(a) Licensees of AM, FM, or TV broadcast stations may utilize an automatic transmission system (ATS) in lieu of either direct or remote control of the station transmitting system.

(b) No authorization from the FCC is required to operate the transmitter using an automatic transmission system. Prior to commencing use of the ATS, the station chief operator, technical director, or consulting engineer shall certify in writing to the station licensee that the system has been installed, tested, and fully complies with all prescribed technical standards of the Rules applicable to the particular class of station.

(c) Broadcast stations operating automatic transmission systems must be provided with one or more ATS duty operator points. Each such point shall have a means to turn the transmitting apparatus off at all times.

(d) Whenever an automatic transmission system duty operator point is established at a location other than at the main studio or transmitter, notification of that location must be sent to the FCC in Washington, DC, within 3 days of initial use of that point. This notification is not required if responsible station personnel may be contacted at the transmitter or studio site during hours of operation when the ATS duty operator is elsewhere.

(e) The ATS must incorporate circuits that will terminate station transmission within 3 minutes if the adjustment controls do not correct an operating condition which is capable of causing interference.

(f) The transmitting apparatus must be manually activated at the beginning of each broadcast period.

(g) For AM station operation, the ATS may incorporate a means to transmit emergency information under the provisions of § 73.1250(f).

[51 FR 1377, Jan. 13, 1986]

STATE of NEVADA

Certified copies of the following Nevada State public corporation records (Complete files) and copy of current Nevada Revised Statutes (NRS) Chapter 78, are available from:

CHERYL A. LAU
Secretary of State
Capitol Complex
101 Carson Street
Carson City, Nevada 89710

MARGARET LILLO, Publications
Leglislative Counsel Bureau
Legislative Building
401 South Carson Street
Carson City, Nevada 89710

STATE OF NEVADA

DOMESTIC AND FOREIGN CORPORATION LAWS

NRS (Nevada Revised Statutes) CHAPTERS 78, 80 AND 89

Current as of July 1, 1981

Compiled by WM. D. SWACKHAMER Secretary of State

CHAPTER 78
PRIVATE CORPORATIONS

NOTE: Partial List of Statutes

DIRECTORS AND OFFICERS

78.115 Board of directors: Number and qualifications. The business of every corporation must be managed by a board of not less than three directors or trustees, all of whom must be at least 18 years of age. In cases where all the shares of the corporation are owned beneficially and of record by one or two stockholders, the number of directors may be less than three but not less than the number of stockholders. Unless otherwise provided in the certificate or articles of incorporation, or an amendment thereof, directors need not be stockholders.

78.130 Officers of corporation: Selection; terms; duties.

1. Every corporation shall have a president, a secretary, a treasurer, and a resident agent. They shall be chosen by the board of directors and shall hold their offices until their successors are chosen and qualify.

2. Every corporation may also have one or more vice presidents, assistant secretaries and assistant treasurers, and such other officers, agents and factors as may be deemed necessary.

3. All officers, agents and factors shall be chosen in such manner, hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors.

4. Any person may hold two or more offices.

STATE OF NEVADA

DOMESTIC AND FOREIGN CORPORATION LAWS
(Including Professional Organizations)

Chapters 78, 80 and 89 of NRS
Current as of October 1, 1989

CHAPTER 78
PRIVATE CORPORATIONS

NOTE: Partial list of Nevada Revised Statutes (NRS)

DIRECTORS AND OFFICERS

78.115 Board of directors: Number and qualifications. The business of every corporation must be managed by a board of directors or trustees, all of whom must be at least 18 years of age. A corporation must have at least one director, and may provide in its certificate or articles of incorporation, or in an amendment thereto, or in its bylaws, for a fixed number of directors or a variable number of directors within a fixed minimum and maximum, and for the manner in which the number of directors may be increased or decreased. Unless otherwise provided in the certificate or articles of incorporation, or in an amendment thereof, directors need not be stockholders.

78.130 Officers of corporation: Selection; terms; duties.

1. Every corporation shall have a president, a secretary, a treasurer, and a resident agent. They shall be chosen by the board of directors and shall hold their offices until their successors are chosen and qualify.

2. Every corporation may also have one or more vice presidents, assistant secretaries and assistant treasurers, and such other officers, agents and factors as may be deemed necessary.

3. All officers, agents and factors shall be chosen in such manner, hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors.

4. Any person may hold two or more offices.

Filed In The Office Of The Secretary Of State Of The State Of Nevada
August 24, 1981

File No. 5705-81

FILING FEE: $115.00
BY: McDONALD, CARANO,
WILSON, BERGIN, BIBLE,
FRANKOVICH & HICKS
SUITE #440
241 RIDGE STREET
P.O. BOX 2670
RENO, NEVADA 89505

ARTICLES OF INCORPORATION

OF

COMSTOCK BROADCASTERS, INC.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned do hereby associate themselves into a corporation, under and by virtue of the Nevada Revised Statutes, Title

7, Chapter 78, as amended, and do hereby certify and adopt the following Articles of Incorporation:

ARTICLE I

The name of the corporation is COMSTOCK BROADCASTERS, INC.

ARTICLE II

The location of the principal office of the corporation in the State of Nevada is 241 Ridge Street, Suite 440, Reno, Nevada. Branch offices may hereafter be established at such other place or places, either within or without the State of Nevada as may be determined from time to time by the Board of Directors.

ARTICLE III

The purpose for which said corporation is formed is to engage in any lawful activity, including but not limited to, the authorization to construct and maintain a radio station in the State of Nevada. The corporation shall have all powers authorized by Title 7, Chapter 78, of the Nevada Revised Statutes, as amended, except as otherwise provided in these Articles or subsequent amendments thereto.

ARTICLE IV

The amount of the authorized capital stock of this corporation is $100,000.00 divided into 100,000 shares with the par

value of $1.00 per share.

Any and all shares of stock of this corporation of any class shall be paid in as the Board of Directors may designate and as provided by law, in cash, real or personal property, option to purchase, or any other valuable right or thing, for the uses and purposes of the corporation, and said shares of stock when issued in exchange therefor shall thereupon and thereby become and be fully paid, the same as though paid for in cash, and shall be nonassessable forever, and the judgment of the Board of Directors of the corporation concerning the value of the property, right or thing, acquired in purchase or exchange for capital stock shall be conclusive. No stockholder shall have any pre-emptive rights.

ARTICLE V

Members of the governing board shall be known as "Directors", and the number thereof shall not be less than three nor more than five, the exact number to be fixed by the Board of Directors of the corporation, provided that the number so fixed by the Directors may be increased or decreased from time to time.

ARTICLE VI

The names and addresses of the first Board of Directors of the corporation, which are three (3), are as follows:

Glenda Robideau
423 Pyramid Way
Sparks, Nevada 89431

Linda B. Eller
2905 Scholl Drive
Reno, Nevada 89503

C. Dale Gray
18130 Northridge Avenue
Reno, Nevada 89506

ARTICLE VII

The stock of this corporation, after the amount of the subscription price, or par value has been fully paid in, shall be nonassessable forever, and shall not be subject to pay the debts of the corporation.

ARTICLE VIII

The names and addresses of the subscribers signing these Articles of Incorporation are as follows:

Glenda Robideau
423 Pyramid Way
Sparks, Nevada 89431

Linda B. Eller
2905 Scholl Drive
Reno, nevada 89503

C. Dale Gray
18130 Northridge Avenue
Reno, Nevada 89506

ARTICLE IX

The corporation is to have perpetual existence.

ARTICLE X

A resolution, in writing, signed by all of the members of the Board of Directors of the corporation, shall be and constitute action by the Board of Directors to the effect therein expressed with the same force and effect as though such resolution had been passed at a duly convened meeting, and it shall be the duty of the Secretary to record every such resolution in the Minute Book of the corporation under its proper date.

ARTICLE XI

The Directors shall have the power to make and alter the By-laws of the corporation. By-laws so made by the Directors under the power so conferred may be altered, amended or repealed by the Directors or by the Stockholders at any meeting called and held for that purpose.

IN WITNESS WHEREOF, we have hereunto set our hands and executed these Articles of Incorporation this 20th day of August, 1981.

/s/_____
Glenda Robideau

/s/_____
Linda B. Eller

/s/_____
C. Dale Gray

STATE OF NEVADA)
:ss:
COUNTY OF WASHOE)

On this 20th day of August, 1981, personally appeared before the undersigned, a Notary Public, in and for the County of Washoe, State of Nevada, Glenda Robideau, Linda B. Eller and C. Dale Gray, known to me to be the persons described in and who executed the foregoing instrument and who acknowledged to me that they and each of them executed the foregoing instrument freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/_____
Notary Public

COMSTOCK BROADCASTERS, INC.

5705-81
A NEVADA CORPORATION FOR THE FILING PERIOD
AUGUST 1981 TO AUGUST 1982

Filed September 11, 1981

Excerpts Only

ROBERT W. CARROLL, President, Director
4570 Alder Drive, Reno, Nevada 89502

RICK HEANEY, Vice President, Director
3935 Heavenly Valley Lane, Reno, Nevada 89509

DENNIS J. MANDELL, Secretary/Treasurer, Director
2230 Mueller Drive, Reno, Nevada 89509

/s/Resident Agent, 9/9/81
Robert L. McDonald
Suite #440
241 Ridge Street
Reno, Nevada 89501

/s/Robert W. Carroll, President

AMENDED, 5705-81
COMSTOCK BROADCASTERS, INC.

Filed May 31, 1982

ROBERT W. CARROLL, President, Director
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary/Treasurer
4570 Alder Drive, Reno, Nevada 89502

No Resident Agent Signature

/s/Robert W. Carroll, 5/17/82

FILED In The Office Of The Secretary Of State Of The State Of Nevada
May 21, 1982

Filing Fee: $20.00

By: McDonald, Carano,
Wilson, et al
P.O. Box 2670
Reno, Nevada 89505

CERTIFICATE OF AMENDMENT OF
ARTICLES OF INCORPORATION
OF
COMSTOCK BROADCASTERS, INC.

ROBERT W. CARROLL and DENNIS J. MANDELL, being the President and Secretary, respectively, of COMSTOCK BROADCASTERS, INC., a Nevada corporation, pursuant to the provisions of Section 78.385 of the Nevada Revised Statutes, do hereby certify:

That they are the President and Secretary of COMSTOCK BROADCASTERS, INC.; that the original Articles of Incorporation of said corporation were filed with the Secretary of State on August 24, 1981; that said Articles were duly filed with the Washoe County Clerk on September 1, 1981; that on May 12, 1982 the following resolution was adopted by the directors of said corporation and approved by the shareholders of said corporation:

Article V of the Articles of Incorporation, as amended, shall read as follows:

"Members of the governing board shall be known as directors and

the number thereof shall not be less than three nor more than five, except that, in cases where all the shares of the corporation are owned beneficially and of record by either one or two stockholders, the number of directors may be less than three but not less than the number of stockholders."

IN WITNESS WHEREOF, the undersigned President and Secretary have executed this Certificate of Amendment of Articles of Incorporation on the 17th day of May, 1982.

/s/_____
ROBERT W. CARROLL

/s/_____
DENNIS J. MANDELL

STATE OF NEVADA)
:ss:
COUNTY OF WASHOE)

On this 17th day of May, 1982, personally appeared before me, a Notary Public, ROBERT W. CARROLL and DENNIS J. MANDELL, who acknowledged that they executed the foregoing Certificate of Amendment of Articles of Incorporation.

/s/_____
Notary Public

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.
A NEVADA CORPORATION FOR THE FILING PERIOD AUGUST 1982 TO AUGUST 1983

Filed May 31, 1983

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA DEE CARROLL, Secretary/Treasurer
4570 Alder Drive, Reno, Nevada 89502

No Resident Agent Signature

/s/Robert W. Carroll, 5/27/83

RESOLUTION CHANGING LOCATION OF PRINCIPAL OFFICE
AND OR RESIDENT AGENT
OF
COMSTOCK BROADCASTERS

Filed May 31, 1983
William D. Swackhamer
Secretary of State

RESOLVED, That the location of the principal office of the above named corporation, now located at SUITE 440, 241 RIDGE STREET, City of Reno, County of Washoe, State of Nevada, be and the same is hereby changed to 4570 ALDER DRIVE, in City of Reno, County of Washoe, State of Nevada.

RESOLVED, That ROBERT W. CARROLL with office located at 4570 ALDER DRIVE, in the City of Reno, State of Nevada, be and the same hereby is appointed Resident Agent of the above named corporation in lieu of ROBERT McDONALD, formerly its Resident Agent.

RESOLVED, That the President and Secretary of this corporation be, and they are hereby, instructed to certify to and file a copy of this resolution in the office of the Secretary of State of Nevada, and likewise a copy of this resolution with the County Clerk of WASHOE County, State of Nevada, as required by law to effect such change of location of principal office and or resident agent.

WE, the undersigned, President and Secretary of the above named corporation, hereby certify that the above and foregoing resolutions and or resolution were duly adopted by the Board of Directors at a meeting held on the 27TH day of MAY, 1983.

/s/_____ _____
President Secretary

CERTIFICATE OF ACCEPTANCE OF
APPOINTMENT BY RESIDENT AGENT
I, Robert W. Carroll, hereby
accept the appointment as
Resident Agent of the above
named corporation.
Date: 5/31/83

/s/_____
Signature of Resident
Agent

5705-81

AFFIDAVIT FOR REINSTATEMENT OF
REVOKED CORPORATE CHARTER

That affiant:
ROBERT CARROLL
As President of
COMSTOCK BROADCASTERS, INC.
a corporation organized under the laws of the State of Nevada

(Portion omitted)

That affiant desires to effect the reinstatement of said charter and transmits herewith remittance in the total sum of $25.00; the same being

the amount of the delinquent filing fee, or fees; and penalty, or penalties, thereon to August 1982, and attaches hereto a list of the current officers, directors, and designation of resident agent.

Signed_____

Subscribed and sworn to before me this 27th day of May, 1983.

/s/_____
Notary Public

STATE OF NEVADA
DEPARTMENT OF STATE

CERTIFICATE OF REINSTATEMENT

Comstock Broadcasters, Inc.

1982-83 List of officers & penalties $25.00

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State, at my office, in Carson City, Nevada, this 31st day of May, A.D., 1983.

/s/ William D. Swackhamer
Secretary of State

LIST OF OFFICERS, DIRECTORS AND AGENT OF 5705-81

COMSTOCK BROADCASTERS, INC.

A NEVADA CORPORATION INCORPORATED ON AUGUST 24, 1981.
THIS LIST IS FOR THE FILING PERIOD AUGUST 1983 TO

AUGUST 1984

Filed June 30, 1983

ROBERT WILLIAM CARROLL, President
4570 Adler Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary-Treasurer
4570 Adler Drive, Reno, Nevada 89502

/s/ Resident Agent, 6/21/83
Robert W. Carroll

/s/ Robet W. Carroll, President, 6/21/83

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.

THIS LIST IS FOR THE FILING PERIOD AUGUST 1984 TO AUGUST 1985

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
45470 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

RESIDENT AGENT

/s/ Robert William Carroll

/s/ Robert William Carroll, President, 6/15/84

ATTACHED TO ABOVE LIST OF OFFICERS,
FILING PERIOD AUGUST 1984 TO AUGUST 1985

INSTRUCTIONS - PLEASE READ

1.) YOU MUST SHOW A PRESIDENT, SECRETARY AND TREASURER - ONE PERSON CAN HOLD ALL THREE POSITIONS.

2.) IF THERE IS A CHANGE OF RESIDENT AGENT OR PRINCIPAL PLACE OF BUSINESS, CONTACT OUR OFFICE FOR THE PROPER FORMS TO MAKE THE CHANGE.

3.) HAVE AN OFFICER SIGN THE "LIST OF OFFICERS" FORM.

4.) IF THERE ARE ADDITIONAL OFFICERS AND DIRECTORS, ATTACH THE LISTING TO THIS FORM.
   a. The officers' name and addresses that have been pre-printed on the form are those of the latest list of officers that was filed.
   b. If changes are necessary, the old information should be lined out and the new information typed or plainly printed directly above it.

5.) YOUR CANCELLED CHECK WILL BE YOUR RECEIPT FOR THE FILING OF THE LIST OF OFFICERS. IF YOU DESIRE A RECEIPT (CERTIFICATE), YOU WILL HAVE TO ENCLOSE A SELF-ADDRESSED AND STAMPED ENVELOPE.

6.) MAKE CHECKS PAYABLE TO THE SECRETARY OF STATE
   RETURN TO... CAPITOL COMPLEX (702) 885-5203
   CARSON CITY, NV 89701

7.) THE FEE IS $30.00 PLUS $10.00 PENALTY IF FILED LATE.

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.

THIS LIST IS FOR THE FILING PERIOD AUGUST 1985 TO AUGUST 1986
AND IS DUE BY AUGUST 31, 1985.

Filed July 5, 1985

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

NO RESIDENT AGENT SIGNATURE

NO SIGNATURE OF OFFICER

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.

A NEVADA CORPORATION INCORPORATED ON AUGUST 24, 1981
THIS LIST IS FOR THE FILING PERIOD AUGUST 1986 TO AUGUST 1987
AND IS DUE BY AUGUST 31, 1986.

Filed June 17, 1986

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

RESIDENT AGENT
/s/ Robert W. Carroll,

Robert W. Carroll, President, 6/16/86

LIST OF OFFICERS, DIRECTORS AND AGENT OF

5705-81 COMSTOCK BROADCASTERS, INC.

A NEVADA CORPORATION INCORPORATED ON AUGUST 24, 1981.
THIS LIST IS FOR THE FILING PERIOD AUGUST 1987 TO AUGUST 1988.
AND IS DUE BY AUGUST 31, 1987.

FILED JUNE 26, 1987

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

No Resident Agent Signature

Robert W. Carroll, President, 6/24/87

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.
Nev. 8/24/81 AUGUST 1988-1989

Filed October 3, 1988

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

WILLIAM B. AKERT, Director
4570 Alder Drive, Reno, Nevada 89502

ROBERT W. CARROLL, Director
4570 Alder Drive, Reno, Nevada 89502

No Resident Agent Signature

/s/ Robert W. Carroll, President, 9/22/88

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.

A NEVADA CORPORATION INCORPORATED ON AUGUST 24, 1981.
THIS LIST IS FOR THE FILING PERIOD AUGUST 1989 TO AUGUST 1990 AND IS DUE BY AUGUST 31, 1989.

Filed July 21, 1989

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

No Resident Agent Signature

/s/ Robert W. Carroll, President, 6/15/89

LIST OF OFFICERS, DIRECTORS AND AGENT OF
5705-81 COMSTOCK BROADCASTERS, INC.

A NEVADA CORPORATION INCORPORATED ON AUGUST 24, 1981.
THIS LIST IS FOR THE FILING PERIOD AUGUST 1990 TO AUGUST 1991 AND IS DUE BY AUGUST 31, 1990.

Filed August 7, 1990

ROBERT WILLIAM CARROLL, President
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Secretary
4570 Alder Drive, Reno, Nevada 89502

MARVA D. CARROLL, Treasurer
4570 Alder Drive, Reno, Nevada 89502

Signature Of Officer

/s/ Robert W. Carroll, President, 8/20/90[1]

Filed In The Office Of The Secretary Of The State Of Nevada
November 14, 1985
Wm. Swackhamer, Secretary of State
No. 7627-85

FILING FEE: 300.00
BY: WILLIAM A. PREZANT
P.O. BOX 21150
RENO, NEVADA 89515

ARTICLES OF INCORPORATION

OF

SIERRA NEVADA ASSOCIATES, INC.

KNOW ALL MEN BY THESE PRESENTS:

We, the undersigned, being each of the original incorporators herein named, for the purpose of forming a corporation

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[1] List of Officers for 91-92, not available as of August 23, 1991. May be on delinquent status as of September 25, 1991.

to do business both within and without the State of Nevada, and in pursuance of the corporation laws of the State of Nevada, being Chapter 78 of the Nevada Revised Statutes, do make and file these Articles of Incorporation hereby declaring and certifying that the facts herein stated are true:

FIRST: The name of this corporation is:

SIERRA NEVADA ASSOCIATES, INC.

SECOND: The corporation is to have perpetual existence.

THIRD: Its principal office in the State of Nevada is located at 241 Ridge Street, Suite 300, Reno, Nevada 89502.

The name and address of its Resident Agent is WILLIAM A. PREZANT, Esq., 241 Ridge Street, Suite 300, Reno, Nevada 89501.

The corporation may also maintain offices at such other places within or without the State of Nevada as it may from time to time determine. Corporate business of every kind and nature may be conducted, and meetings of directors and shareholders may be held outside the State of Nevada with the same effect as if in the State of Nevada.

FOURTH: The purpose for which the corporation is

organized is to engage in any lawful activity within or without the State of Nevada.

FIFTH: The amount of the total authorized capital stock of the corporation is ONE HUNDRED THOUSAND SHARES (100,000) shares, without par value. All of the said shares shall be of one class, without series or other distinction, and shall be designated as "Common Stock".

SIXTH: The capital stock, after the amount of the subscription price has been paid in money, property, or services, as the Directors shall determine, shall be subject to no further assessment to pay the debts of the corporation, and no stock issued as fully paid up shall ever be assessable or assessed, and these Articles of Incorporation shall not and cannot be amended, regardless of the vote therefor, so as to amend, modify or rescind this Article SIXTH or any of the provisions hereof.

SEVENTH: The members of the governing Board of the Corporation shall be styled "Directors", and the first Board shall be two (2) in number.

So long as all of the shares of the corporation are owned beneficially and of record by either one or two shareholders, the number of directors may be less than three, but not less than the number of

shareholders. Otherwise, the number of directors shall not be less than three.

Subject to the foregoing limitations, the number of directors shall not be reduced to less than one, and may, at any time or times, be increased or decreased by a duly adopted amendment to these Articles of Incorporation, or in such manner as shall be provided in the By-Laws of the corporation or by an amendment to the By-Laws of the corporation duly adopted by either the Board of Directors or the shareholders.

The names and addresses of the first Board of Directors are as follows:

DIRECTORS	ADDRESS
LEE HIRSHLAND	255 Southridge Drive Reno, Nevada 89509
WILLIAM A. PREZANT	241 Ridge Street, Suite 300 Reno, Nevada 89501

EIGHTH: In furtherance, and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

To determine from time to time whether and if allowed, under what conditions and regulations the accounts and books of the corporation (other than the books required by law to be kept at the principal office of the corporation in Nevada) or any of them, shall be

open to the inspection of the stockholders and the stockholders' rights in this respect are and shall be restricted or limited accordingly.

To make, alter, amend and rescind the By-Laws of the corporation, to fix the amount to be reserved as working capital; and to fix the times for the declaration and payment of dividends, to authorize and cause to be executed mortgages and liens upon the real and personal property of the corporation.

With the consent in writing or pursuant to the affirmative vote of the holders of at least a majority of the stock issued and outstanding, at a stockholders' meeting duly called for that purpose, to sell, assign, transfer or otherwise dispose of the property of the corporation as an entirety.

In order to promote the interests of the corporation and to encourage the utilization of the corporation's lands and other property, to sell, assign, transfer, lease and in any lawful manner dispose of such portions of said property as the Board of Directors shall deem advisable, and to use and apply the funds received in payment therefore to the surplus account for the benefit of the corporation, or the payment of dividends, or otherwise; provided that a majority of the whole board concur therein, and further provided that the capital stock shall not be decreased except in accordance with the laws of Nevada.

By a resolution passed by a majority of the whole board, under suitable provision of the By-Laws, to designate two or more of their number to constitute an executive committee, which committee shall, for the time being, as provided in said resolution or in the By-Laws, have and exercise any and all of the powers of the board of directors which may be lawfully delegated in the management of the business and affairs of the corporation.

To make provision for reasonable compensation to its members for their services as directors and to fix the basis and conditions upon which this compensation shall be paid. Any director may also serve the corporation in any other capacity and receive compensation therefor in any form.

The corporation reserves the right to amend, alter, or

repeal any provisions contained in these Articles of Incorporation in the manner now or hereafter prescribed by statute, and all rights conferred on stockholders herein are granted subject to this reservation.

NINTH: Each common shareholder of the corporation shall be entitled to full preemptive or preferential rights, as such rights are defined by law, to subscribe for or purchase his proportional part of any shares or securities which may be issued at any time or from time to time by the corporation.

TENTH: Every person who was or is a party or is threatened to be made a party to or is involved in any action, suit or proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that he or a person for whom he is the legal representative is or was a director or officer of the corporation or is or was serving at the request of the corporation as a director or officer of another corporation, or as its representative in a partnership, joint venture, trust or other enterprise, shall be indemnified and held harmless to the fullest extent legally permissible under the law of the State of Nevada from time to time aginst all expenses, liability and loss (including attorney's fees, judgments, fines and amounts paid or to be paid in settlement) reasonably incurred or suffered by him in connection therewith. Such right of indemnification shall be a contract right which may be enforced in any manner desired by such person. Such right of

indemnification shall not be exclusive of any other right which such directors, officers or representatives may have or hereafter acquire and, without limiting the generality of such statement, they shall be entitled to their respective rights of indemnification under any By-Law, agreement, vote of stockholders, provision of law or otherwise, as well as their rights under this Article.

Without limiting the application of the foregoing, the Board of Directors may adopt By-Laws from time to time with respect to indemnification to provide at all times the fullest indemnification permitted by the law of the State of Nevada and may cause the corporation to purchase and maintain insurance on behalf of any person who is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of another corporation, or as its representative in a partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred in any such capacity or arising out of such status, whether or not the corporation would have the power to indemnify such person.

ELEVENTH: The names and addresses of the incorporators of the Corporation are as follows:

NAME	ADDRESS
WILLIAM A. PREZANT	241 Ridge, Suite 300 Reno, Nevada 89501
ROBERT C. ANDERSON	241 Ridge, Suite 300 Reno, Nevada 89501
MARY VIDOR	241 Ridge, Suite 300 Reno, Nevada 89501

IN WITNESS WHEREOF, we have hereunto set our hands this 10th day of November, 1985, hereby declaring and certifying that the facts stated hereinabove are true.

/s/ William A. Prezant

/s/ Robert C. Anderson

/s/ Mary Vidor

STATE OF NEVADA)
:ss.
COUNTY OF WASHOE)

On this 13th day of November, 1985, personally appeared before me, a Notary Public, WILLIAM A. PREZANT, ROBERT C. ANDERSON, and MARY VIDOR, who acknowledged to me that they executed the foregoing instrument.

/s/ NOTARY PUBLIC

LIST OF OFFICERS, DIRECTORS AND AGENT OF
7627-85 60 DAY LIST

SIERRA NEVADA ASSOCIATES, INC.

Nevada 11-14-85 Nov 1985 - Nov 1986

Filed May 28, 1986

LEE HIRSHLAND & /s/over, President
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

LEE HIRSHLAND & /s/over, Secretary
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

LEE HIRSHLAND & /s/over, Treasurer
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

Resident Agent

/s/ William A. Prezant
241 Ridge Street, Ste. 300, Reno, NV 89501
4,29,86

/s/ Lee Hirshland, President, 5/8/86

LIST OF OFFICERS, DIRECTORS AND AGENT OF
7627-85

SIERRA NEVADA ASSOCIATES, INC.

A NEVADA CORPORATION INCORPORATED ON NOVEMBER 14, 1985.
THIS LIST IS FOR THE FILING PERIOD NOVEMBER 1986 TO NOVEMBER 1987 AND IS DUE BY NOVEMBER 30, 1986.

Filed July 27, 1987

LEE HIRSHLAND, President
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

LEE HIRSHLAND, Secretary
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

LEE HIRSHLAND, Treasurer
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

Resident Agent

/s/ William A. Prezant
241 Ridge Street, Ste. 300, Reno, NV 89501
6/20/87

/s/ Lee Hirshland, President, 7/23/87

LIST OF OFFICERS, DIRECTORS AND AGENT OF 7627-85

SIERRA NEVADA ASSOCIATES, INC.

NEVADA NOVEMBER 14, 1985 NOVEMBER 1987-1988

Filed 1/20?, 28?, 29?/88

LEE HIRSHLAND, President
P.O. Box 40550, Reno, Nevada 89504
133 North Sierra, Reno, Nevada 89501

(Same), Secretary

(Same), Treasurer

(Same), Director

No Resident Agent Signature or Address

/s/ Lee Hirshland, President, 1/11/88

Rest of files omitted.

CERTIFICATE OF BUSINESS: FICTITIOUS FIRM NAME

FILED '88 June 24 A10:13

THE UNDERSIGNED do hereby certify that IT IS conducting a PUBLIC RELATIONS business at 129 BELL ST., RENO, 89503 Nevada, under the fictitious firm name of PUBLIC RELATIONS OF NEVADA and that said firm is composed of the following person__, whose name and address as follows, to-wit:

LEE D. HIRSHLAND, PRESIDENT - SIERRA NEVADA ASSOCIATES, 133 N. SIERRA, RENO, NV #201

WITNESS MY hand this 24th day of JUNE, 1988.

DL 196.12.6272 /s/Lee D. Hirshland

STATE OF NEVADA, ss. COUNTY OF WASHOE

On this 24th day of JUNE A.D.___1988 personally appeared before me, a XXX JUDI BAILEY, WASHOE COUNTY CLERK XXX LEE D. HIRSHLAND who acknowledged that he executed the above instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official stamp at my office in the County of Washoe the day and year in this certificate first above written.

JUDI BAILEY, COUNTY CLERK
By /s/ Signature of DEPUTY 047116

LOCAL INFORMATION

Certified copies of the following news articles are available from:

Reno Gazette-Journal
955 Kunzli Lane
Reno, Nevada 89502

News article dated: Tuesday, November 13, 1984; Reno Gazette-Journal:

RENO'S RADIO CRAZE
19 STATIONS BATTLE FOR BUCKS, LISTENERS, By Terri Gunkel

If you're like a lot of other people, the radio wakes you up in the morning. It accompanies you to work, on your way home and all the other car trips in between. It may be a source of entertainment or information instead of watching television.

And chances are, the station you listen to isn't what your neighbor listens to.

In the Reno area, with 19 AM and FM stations already on the air and several others planning to come in, the air waves are teeming with sound. Some say there are too many stations for an area of Reno's size.

"We have five country/western stations in Reno and that's utterly ridiculous," said Bob Carroll, who is involved in a FCC court battle with Pepper Schultz for the rights to start another radio station - non-country. "Chicago doesn't have five, New York doesn't have five, Los Angeles doesn't have five."

But others see the alphabet soup of call letters as a way of forcing stations to provide the best programming they can, while giving listeners a wide choice of formats.

"I came from Oklahoma City which had 21 radio stations in a market of 900,000," said John Rogers, general manager of KOLO. "Reno has 19 in a market of 200,000. There's a tremendous amount of radio product to choose from, and as competition comes into the market, it forces us to do a better job to stay on top."

In the Reno area, there are eight rock stations (42 percent), five country stations (26.3 percent), two oldies stations (10.5 percent), and one each with a format of news-talk, classical-jazz, contemporary Christian or easy listening (5.25 percent each).

Six are owned as an AM-FM combination, something the general managers say makes their stations a more attractive buy for advertisers.

Then there is the battle between Schultz and Carroll for rights to a Sparks FM station at 92.1 on the dial. Schultz, whose application was favored originally, said he plans to play middle-of-the-road popular music. Carroll, who is appealing the decision, said he has a new concept for programming, but declined to be specific because of the competition.

KNSS, a Carson City FM station owned by Ken Stice, has plans to go on the air the end of November with a format of country music. Jim King, general manager of KLKT-FM (100.1) in Incline Village, which signed on on June 10, 1983, has received FCC authorization to install a translator on Slide Mountain which will let its signal reach into Reno. King said he also hopes to be broadcasting his adult contemporary music into Reno by the end of November.

News article dated: Saturday, January 25, 1986; Reno Gazette-Journal:

APPLICANT LOSES LICENSE FOR RADIO STATION IN SPARKS

WASHINGTON (AP) - The Federal Communications Commission Review Board Friday overturned the award of an FM radio license to Pepper Schultz, who wanted to run a one-man, 24-hour-a-day operation a Sparks.

The board turned over the license to operate a station at 92.1 on the dial to a competing applicant, Comstock Broadcasters Inc.

"We must reverse the administrative law judge's erroneous conclusion that Schultz is basically qualified to be a licensee," the review board decision stated.

Comstock had argued Schultz did not plan to hire enough people and did not have the financial resources to properly operate a station.

In his initial application, Schultz said he would operate the station alone, around the clock. The board found the staffing proposal to be "patently incredible."

Later, Schultz, an employee of the Interior Department's Bureau of Land Management, said he would get free help from six friends.

But the board members said the staff had no legal right to accept that amendment to the Schultz application.

"In general, the commission demands that an applicant have its proposal in order at the time it files its application," the decision said.

The review board said Schultz had enough money to run "a modest roadside fruit stand" but not to operate a full-time radio station.

"His insistence throughout the comparative hearing that he alone would perform all of the myriad functions of an ongoing broadcast station - with neither sleep nor curcease - constituted irrefragable evidence that Schultz was either distantly out of touch with reality or singularly qualified for the laurel of 'FCC Fabulist of the Decade," board member Norman B. Blumenthal wrote.

Schultz got the initial nod when the hearing judge concluded that he should be preferred over Comstock because he as owner would spend his full time operating the station and only some of Comstock's owners pledged to work full time.

News article dated: July 12, 1988; Reno Gazette-Journal:

TRIO PLACE CENTURY OF EXPERIENCE INTO PR FIRM
By Lisa Ovens

With nearly 100 years of marketing experience among them, three local businessmen are putting their public relations talents to work in Reno.

Forming Public Relations of Nevada Ltd. are Lee Hirshland, Bob Carroll and Bill Hull. The firm has been in business for less than a week at 129 Bell St.

The company was born from the merger of Sierra Nevada Associates owned by Hirshland, and Bob Carroll Advertising,[1] Carroll said Monday. Hull joined the duo after realizing he wasn't ready for retirement upon leaving Valley Bank of Nevada as executive vice president in February.

"It's kind of a reunion for us," Carroll said, referring to his professional relationship with Hirshland and longtime friendship with both. In 1959, Carroll became news director at KOLO-TV when Hirshland was general manager.

Hull has been in the banking business for 33 years, 25 of which were spent at Valley Bank, he said.

Before founding Bob Carroll Advertising in March, Carroll was president of Media Consultants, a company he founded in 1970. Upon

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[1] A record search of any combination of names and words in "Bob Carroll Advertising and Public Relations" in the Fall of 1988 for April 1, 1988, disclosed nothing from Washoe County, City of Sparks and City of Reno business records.

his departure in February, Carroll sold his 40 percent interest in the company to partner Dennis Mandell.

Under Carroll's guidance, Media Consultants for 11 years handled advertising for the Reno-Sparks Convention and Visitors Authority. The firm lost the RSCVA account last year, which was the reason for Carroll's departure.

Hirshland is Public Relations of Nevada's president; Carroll, executive vice president and senior partner; and Hull is executive vice president and managing partner.

"Public relations we're trying to make our major thrust," Carroll said.

Clients of the firm include the Coalition for Available/Affordable Liability Insurance, Reno Chrysler-Plymouth, Ben's Discount Liquors and a portion of the Economic Development Authority of Western Nevada account.

"We see a lot of new businesses coming into western and northern Nevada and I think we're past the phase of businesses starting and not being able to determine their market. I think there's really a need now for sound marketing plans and that's what we're here to do," Carroll said.

Although Hull has no direct public relations or advertising experience, he said: "Being in the industry I was in, marketing myself and Valley Bank, you gain a certain amount of knowledge."

Hull also is chairman of the board of directors of the Reno-Sparks Convention and Visitors Authority and is a past president of the Reno Chamber of Commerce.

NOTE: Local public information (News article) is that Lee Hirshland in the above news article, formally was a 40% stockholder of KTVN, channel 2, and sold for approximately 12.4 million dollars cash and "no competition" by Lee Hirshland in the broadcast market.

News article dated: Monday, December 26, 1988; Reno Gazette-Journal:

INFORMATION BANK
Business Licences, Reno

Public Relations of Nev., Lee D. Hirshland, Pres., 129 Bell St., Reno; change of location and firm name, previously: Sierra Nevada Associates, advertising/public relations.

Certified copies of the following letter are from attorneys records and may be obtained from:

KOTEEN & NAFTALIN
1150 Connecticut Avenue
Washington, D.C. 20036

The following letter of November 17, 1988 from Putbrese, Hunsaker & Ruddy, 6800 Fleetwood Road, Suite 100, McLean, Virginia 22101, Client - Comstock Broadcasters, Inc., volunteered information to give to Pepper Schultz through legal counsel and is public information as far as Pepper Schultz is concerned:

PUBLIC RELATIONS OF NEVADA, LTD.

November 17, 1988

Mr. David Hunsaker
Putbrese and Hunsaker
McLean House Suite 100
P.O. Box 539
McLean, VA 22101

Dear David:

I appreciate the work that you did prior to our appearance before Judge Tierney on Tuesday. Riding back on the airplane gave me some time to reflect on the entire matter and where we may be headed. There is no question in my mind that the judge sincerely would like to see a settlement in this case.

I am confident that we will in the end prevail and I again want to emphasize that I am still highly committed to owning and operating the station. With that in mind, we are not interested in the $50,000.00 figure, to go away and give the station to Pepper. If this amount were significantly higher I'm sure at least Ben might have some interest.

My feeling of confidence, David, leads me to believe that we will eventually end up with the radio station, but as the judge pointed out,

that could take a considerable amount of time.

Dan Miller impresses me as a very reasonable person. I am wondering if you could urge Dan to talk with Pepper and have him seriously consider our offer of a merger? We are still willing to give Pepper a percentage of the station and, if he wants to, the opportunity to function in some type of engineering capacity. One of my plans, David, is to acquire some other radio properties once we get operational with 92.1. The first on the list could certainly be a Reno AM Station. If we were able to merge with Pepper I might offer him the opportunity to take on the AM Station and even look to a possible total ownership of that station for Pepper, if he is determined to have a radio property.

David, please relay to Dan Miller that I am not trying to dampen Pepper's enthusiasm for his desire to have a station, but again I must point out the reality of doing business in this area with an already over-saturated market. It may seem like the same old song and dance, but believe me, I work daily with a number of stations in this market and I know what the "facts of life" are. I feel that I have a very strong knowledge of what will work and how to become competitive in a very short period of time. There is still a niche in the market that is not being filled and that is what I intend to go after.

We are going to have an excellent operation and it will be one Pepper should be proud to become associated with. I have no problem with your sending a copy of this letter to Dan Miller, in the hopes he might be able to persuade Pepper that a merger really would be in his best interests at this point in time.

I also have no problem with Pepper contacting me directly to discuss any part of this proposition.

Regards,

/s/ Bob Carroll
Senior Partner

cc: Ben Akert
BC:ck

NOTE: Address of above letterhead:

129 Bell Street•P.O. Box 40550•Reno, Nevada 89504•(702)348-0057

Certified copies of the following Broadcasting Magazine and Yearbook articles are available from:

Broadcasting
1735 DeSales Street, N.W.
Washington, D.C. 20036

Magazine article dated: February 4, 1985, Broadcasting Magazine:

SHOESTRING IN SPARKS

The FCC Review Board has remanded to an administrative law judge the case pitting Pepper schultz against Comstock Broadcasters Inc. for a new FM in Sparks, Nev. In the initial decision, ALJ James Tierney granted Schultz's application (BROADCASTING, Aug. 20, 1984). But the Review Board told the AlJ to take another look "to explore patent inadequacies" in Schultz's proposed staffing and to determine whether Schultz had sufficient funds to cover the costs of construction and operation for the initial three months. The board said Schultz's indication that he wouldn't be able to hire helpers until "money started rolling in" after several months raised the issue of whether Schultz had the financial resources to qualify for licenseeship.

Magazine article dated: 1990, Broadcasting Yearbook:

NEVADA, Sparks, New FM—Not on air, target date unknown: 92.1 mhz. Box 1033, Reno (89504). Comstock Broadcasters Inc.

The following public statement made to Pepper Schultz *circa* May 24, 1991:

Sometime during the month of January, Bob Carroll called me. He wanted to know if I would be interested in investing and being part of the management of the new radio station he was going to put on the air. I was aware that there had been litigation going on for many years regarding that particular frequency and I asked him if he had finally

gotten a construction permit. He said he had and wanted to have the station on the air in early 1991. I told him I would think about it and let him know. I called him several days later and told him I was not interested.

/s/ James E Elliott
2555 Homeland Dr.
Reno, NV 89511

/s/ Evelyn Cumming
Notary Public - State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES JAN. 13, 1995

News article dated: Wednesday, July 17, 1991, Reno Gazette-Journal:

AREA BUSINESSMAN LUTHER MACK, PARTNERS GET GREEN LIGHT FOR NEW TV STATION
By Wayne Melton

The Federal Communications Commission has awarded businessman Luther Mack and several partners the right to start a TV station on channel 11 in the Reno-Sparks area.

The station, owned and operated by Nevada Television Corp., tentatively is set to air in fall 1992, said co-owner Steven t. Walther, a Reno lawyer.

"We're excited about it, because we fought hard" to get licensed, said Mack, corporation president and owner of several Reno-Sparks McDonald's restaurants.

The call letters will be picked later.

It will be the fourth Reno-Sparks area VHF station (the channels at the low end of the TV dial, 2-13). The others are affiliated with major commercial networks, ABC, NBC and CBS. One local UHF station, KAME Channel 21, airs the FOX Network.

"We see ourselves as the only VHF independent in Reno, which should position us well in the marketplace," Walther said. Officials haven't negotiated where the new station will be located on cable system dials.

The station already has had buyout offers, Mack said. But "we want to put it on the air, and get it up and running."

Other partners include former Nevada Attorney General Brian McKay; Virginia Hirshland of Reno; John Brodeur of Boston, a former Reno public relations executive; and several others.

Nevada Television competed against numerous applicants, including a corporation co-owned by local advertising executive Valerie Glenn, and another corporation co-owned by Reno City Councilman Gus Nunez.

The FCC had announced in the mid-1980s that it would issue the new license. The licensing took six years in a series of FCC hearings and legal challenges by other applicants.

Walther called it "a titanic legal struggle."

The corporation won approval at every level of applications and appeals, ending with a July 8 U.S. Appeals Court ruling.

NOTE: Local public information is that Virginia Hirshland in the above news article, is Lee Hirshland's wife.

HISTORY

Concerns Pertaining to Schultz,
Federal Communications Commission,
and Carroll.

December 2, 1968; Schultz tendered for filing an application for a construction permit with the Federal Communications Commission.

December 17, 1969; Commission granted application BPH-6546 construction permit, for a new Class A FM Broadcast Station. Construction permit expires Augut 17, 1970.

January - March, 1970; Bob Carroll and his partner approched Pepper Schultz to buy the Construction Permit. Schultz refused to sell it to them. Carroll said they would like to buy the construction permit and that Schultz could be the engineer and build it for them and be hired on to maintain the station, if Schultz wanted to.

August 17, 1970; Schultz let the construction permit lapse and revert back to the FCC.

March 16, 1974; Schultz tendered for filing another application for a construction permit with the Federal Communications Commission. On April 11, 1974, FCC assigned File No. BPH-8897.

February 20, 1980; Schultz filed a PETITION FOR AMENDMENT OF THE FM TABLE OF ASSIGNMENTS, *pro se*, to include FM Channel 221A, Frequency 92.1 mHz in the FM Table of Assignments.

October 13, 1981; Channel 221A became legal. Schultz had another application for a construction permit before the Federal Communications Commission that same day, and apparently no competing applicants. The rejected application was returned to and received by Schultz by U.S. mail on April 16, 1982, making Channel 221A "open market" again. Within thirty one days, Schultz tendered for filing by mail another application for a

construction permit before the Federal Communications Commission.

May 19, 1982; The Federal Communications Commission accepted Schultz' application for a construction permit for a new FM broadcast station, and assigned it File No. BPH-820519AK. There were two competing applicants. One filed their application approximately three weeks before this date and Schultz was unaware. The other applicant filed their application approximately five weeks after this date.

Supreme Court, U.S.
F I L E D
SEP 23 1991
OFFICE OF THE CLERK

91-503
NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PEPPER SCHULTZ,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
UNITED STATES OF AMERICA, et al.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION OF INTERVENOR-RESPONDENT COMSTOCK BROADCASTERS,INC.

DAVID M. HUNSAKER
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(703) 790-8400
Counsel for Intervenor-Respondent
Comstock Broadcasters, Inc.

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IN THE
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OCTOBER TERM, 1991

No. 91-

PEPPER SCHULTZ,
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v.

FEDERAL COMMUNICATIONS COMMISSION
UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION OF INTERVENOR-RESPONDENT COMSTOCK BROADCASTERS,INC.

Respondent Comstock Broadcasters, Inc.[1] ("Comstock"), Intervenor-Respondent, respectfully requests that this Court deny the Petition for a writ of

[1] There is no parent or subsidiary corporation of Comstock Broadcasters, Inc. *See* Pet. App. 259a-276a.

certiorari filed herein on August 23, 1991, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 21, 1991.

JUDGMENTS AND OPINIONS BELOW

The judgment of the court of appeals (Pet, App. 1a-2a) is an unreported decision pursuant to Local Rule No. 14. The memorandum opinion and order of the Federal Communications Commission (Pet. App 172a-177a) is reported at 5 FCC Rcd 3273 (1990).

JURISDICTION

The judgment *per curiam* of the court of appeals (Pet. App. 1a-2a) was entered on March 21, 1991. The order of the court of appeals denying rehearing (Pet. App. 1a) was entered on May 29, 1991. The petition for a writ of certiorari was filed on August 23, 1991. The jurisdic-

tion of this Court is invoked under 28 U.S.C. §1254(1).

COUNTERSTATEMENT

The petitioner, Pepper Schultz, sought judicial review of the orders of the Federal Communications Commission, which granted the Application of Intervenor-Respondent Comstock Broadcasters, Inc. ("Comstock") for a new FM radio station in Sparks, Nevada, and denying the mutually exclusive application of the petitioner, Schultz. The Commission, after extensive evidentiary hearings, on the qualifications of both applicants, found that Schultz was not qualified to be the Licensee of the station because he failed to establish that he was financially qualified at the time he filed his application, had not demonstrated that he had a realistic staffing proposal, and had not shown good cause for acceptance

of a late-filed putative curing amendment. (Pet. App. 174a-175a).

With respect to the *ex parte* issue added by the Administrative Law Judge pertaining to the qualifications of Comstock, the Commission agreed with the Review Board's *Decision* (Pet. App. 134a-171a) that, while a violation of the *ex parte* rules had occurred, the conduct in question was not so egregious as to warrant the disqualification of Comstock (Pet. App. 171a; 175a-176a).

Schultz appealed the Commission's orders to the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C. §402(b). Upon review of the orders and the briefs filed by each party, and after hearing oral argument, the court of appeals affirmed, without opinion, the orders of the Commission, stating, *per curiam* that

"appropriate disposition of the appeal does not warrant a further opinion" beyond that set forth in the Commission's *Memorandum Opinion and Order* released May 30, 1990. (Pet. App. 2a). The court of appeals further denied Schultz's petition for rehearing.

Schultz, who was represented by counsel in the proceedings below, now files the subject petition for writ of certiorari *pro se*.

ARGUMENT

I. THE ISSUES RAISED BY PETITIONER ARE NOT PROPERLY BEFORE THIS COURT.

The primary thrust of the petition is to convince this Court to grant certiorari on issues neither raised by the petitioner in the proceedings below nor decided by the court of appeals.

Petitioner's first Question (Pet. App. ia), while obscure, purportedly

challenges the orders of the Review Board and the Commission declining to grant Schultz's post-designation amendment, on constitutional grounds. While Schultz did contend he was entitled to amend his application to meet a disqualifying issue under existing precedent, he, at no time claimed that he had a constitutional right to do so. In any event, the question of whether Schultz could offer purported curing amendments for glaring deficiencies in his application was discussed and deliberated at length through the course of two hearings, two Review Board Decisions, and two Commission orders. The issue of whether Schultz was entitled, under existing Commission precedent, to amend his application was presented to the court of appeals, which affirmed the Commission's order without opinion. Petitioner offers no reason or

argument in his petition why that judgment should be disturbed.

Second, Petitioner raises for the first time the question whether the FCC's policy on minimum staffing of proposed broadcast facilities violates a now-repealed provision of the Communications Act of 1934, as amended,[2] or otherwise violates the Due Process Clause of the 5th Amendment, and/or the 9th Amendment to the Constitution. Not having raised such issues in the proceedings below, the Petitioner failed to exhaust administrative and judicial remedies potentially available to him, and should be estopped from raising them before this Court.

Petitioner's third Question seeks to have this Court rule on whether Petition-

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[2] 47 U.S.C. §506 [deleted by Public Law 96-507, 94 Stat. 2747, Dec. 8, 1980]. Former §507 was renumbered §506 pursuant to the same Public Law.]

er, or any party similarly situated, may seek redress from the government, in the form of damages for "unfair Judicial practice and procedures, perverse humor and regulation of Commerce..." While Petitioner has complained of being treated unfairly in proceedings below, this is the first time he has asserted a right of recovery for alleged economic injury. Any claim against the United States for such injury is governed by the Tort Claims Act,[3] and must be initiated in federal district court or the U.S. Court of Claims. This Court does not have original jurisdiction in such matters. Moreover, Petitioner is attempting to set the cart before the horse: He must first demonstrate to this Court what he has so far failed to demonstrate to the Review

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[3] 28 U.S.C. §1436(b).

Board, the Commission, and the court of appeals, *i.e.*, that he was treated unfairly, before he can even begin to argue that alleged errors in the adjudicative process below amounted to tortious conduct by employees of the United States.

Petitioner's fourth Question misstates the action taken by the Review Board and the Commission, and accordingly, is not genuinely in issue: No dissent was posted to the Decision of the Review Board that, under existing Commission precedent, disqualification of Comstock for a violation of the *ex parte* rules, was not warranted.[4] Since the issue raised is based upon a faulty premise, it is not properly before this Court.

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[4] *See* (Pet. App. 171a; 175a-176a)

Petitioner's fifth Question appears to suggest that the rights of natural persons are superior (or, at least, not inferior) to the rights of corporate entities in being compared under established criteria for the award of governmental licenses to use the radio spectrum. This question was neither raised, nor decided in any of the proceedings below, and the Petitioner should be precluded from raising it at this very late date.

Petitioner's sixth Question poses no question of fact or law that was at issue before the court of appeals. The Commission found that there had been a violation of the Commission's *ex parte* rules by Comstock, but that such conduct was isolated, and, under existing precedent, not disqualifying. Comstock did not appeal that conclusion to the court of

appeals, and the question of whether or not the *ex parte* rules had been violated was not before the court of appeals, and cannot be made an issue here. Comstock, by failing to appeal the finding of a violation to the court of appeals, has elected to accept that finding as a given, and there is no point in wasting this Court's time over matters about which no controversy exists.

What *was* at issue before the court of appeals was whether the Commission erred, or otherwise abused its discretion, in not imposing on Comstock a sanction more severe than a simple reprimand. The Commission clearly set forth its reasons for not disqualifying Comstock, and the court of appeals affirmed. The Petitioner does not raise any issue concerning the appropriateness of the sanction imposed on Comstock, however.

Petitioner's seventh and final Question is merely a restatement of Question 3, and is not properly before this Court for the reasons stated above.

II. THE ISSUES DECIDED BY THE COMMISSION AND THE COURT OF APPEALS DO NOT WARRANT REVIEW BY THIS COURT.

As stated in Rule 10 of the Rules of this Court, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Neither the questions specified by the Petitioner, nor the issues actually decided by the court of appeals raise special and important issues warranting review.

Petitioner does not contend, nor is Counsel for Intervenor-Respondent aware, of any decision by any other United

States court of appeals in conflict with the Judgment rendered by the court of appeals below.[5] No federal question decided by a state court of last resort is at issue here.[6]

This is not a case of first impression which should be settled by this Court; rather, the issues presented and resolved are matters frequently dealt with by the Respondent federal agency.[7] And, while Petitioner cites to three past

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[5]The failure of the court of appeals to issue its own opinion, but instead, to state it was satisfied with the reasons given by the Commission in its Memorandum Opinion and Order, cannot be considered to be so far a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision (*see* SUP. CT. RULE 10.1(a)). *Per Curiam* decisions are common enough, and the court of appeals is to be commended for not expending needless human and natural resources in unnecessary repetition of the Commission's own rationale.

[6]SUP. CT. RULE 10.1.(b).

[7]*Id.*, RULE 10.1(c).

decisions of this Court,[8] none of them have even the remotest connection with or application to the facts of this case, and certainly could not be said to be in conflict with the decision of the court of appeals below.

Peper v. Fordyce, *supra*, involved a procedural question of how costs of court should be divided when it was found that the United States court of appeals in that case was without jurisdiction. Nowhere in his verbose, yet highly cryptic petition does the Petitioner explain what this case has to do with the instant case. Schultz seems to argue that both he, and perhaps Comstock as well, may be

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[8]*Peper v. Fordyce*, 119 U.S. 469 (1886) (reprinted at Pet. App. 221-224a); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) (reprinted at Pet. App. 225a-233a); *United States v. Petrillo*, 332 U.S. 1 (1947) (reprinted at Pet. App. 234a-251a).

entitled to redress for legal fees (Pet. p. 9). Schultz not only confuses "costs of court" with "legal fees," but fails to recognize (a) that it is not the government, but the losing party, that ordinarily pays court costs, and (b) that the premise for this Court to exercise discretion in directing who pays costs is totally missing in this case: The court of appeals *did* have jurisdiction over the appeal of Petitioner under 47 U.S.C. §402(b), and Petitioner, who brought the appeal, can hardly be heard now to complain that the court of appeals was without jurisdiction to decide the dispute.

FCC v. Sanders Brothers Radio Station, *supra*, decided two important questions of federal law under the Communications Act: *first*, that adverse economic impact upon an existing broadcast licensee is not a separate and independent

ground for the Commission to refuse to grant an application for a new station which would compete economically with, but not cause electrical interference to, that existing licensee; and *second*, that, while private economic injury, in the absence of any evidence that the public interest would be harmed, may be inadequate, as a basis for denying an application for a new station, it is not inadequate, as a basis for conferring standing on a person or entity to seek review of the Commission's action in the court of appeals, under 47 U.S.C. §402(b)(2). Neither economic injury, due to competition from a new station,[9] nor

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[9]Both Petitioner and Comstock are competing for the same frequency for a new station. No party is asserting here that the community of Sparks, Nevada, or the greater metropolitan area of Reno, Nevada, cannot sustain, economically, the addition of another radio station.

lack of standing to seek review of a Commission order is at issue here.

Finally, Petitioner cites to *United States v. Petrillo, supra*, apparently for the proposition that the federal government may not constitutionally require an applicant for a broadcast construction permit or license to meet minimum standards of staffing a proposed station before it will grant such application.[10] *U.S. v. Petrillo* stands for no such proposition. At issue, in that case, was the facial validity of a [former] provision in the Communications Act[11] to make criminal attempts to coerce radio broadcast licensees, by force, violence, intimidation or duress to employ persons beyond the number *actually needed* by the station

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[10](Petition, p. 9 "B").

[11]47 U.S.C. §506 [since repealed; *see* note 1 *supra*.]

to perform necessary work. A majority of this Court sustained this anti-"feather-bedding" provision as the legitimate exercise of Congress' power to regulate interstate commerce. This Court did *not* therein hold that it was either illegal or unconstitutional for the federal government to hold licensees to minimum standards of staffing and finances so as to assure that the proposed station would operate in the public interest. The *Petrillo* case is therefore totally inapposite.

As to the *constitutional* question purportedly raised by the Petitioner, such questior was *not* raised in any of the proceedings below, and Petitioner is foreclosed from raising it at this late date. The public interest rationale behind such minimum standards—ensuring that the station would be operated by a

sufficient number of personnel so as to guarantee that obligations of a broadcast licensee to operate according to the technical terms of its license, and meet its public service obligations to its community of license, is clearly a legitimate and constitutional end of the power of government to regulate interstate commerce.

Nor did Petitioner, in the proceedings below contend that the Commission was misapplying its own precedent which established minimum standards of station staffing. But, precedent or no, the Commission had a statutory mandate to regulate in the public interest, and for it to approve of a proposal that, *on its face* was inherently incapable of effectuation, would have been a clear violation of that statutory obligation.

Petitioner includes in his Appendix, other materials the relevance and probity of which are neither explained nor justified. While there is no RULE prohibiting the inclusion of totally immaterial information in an appendix to a petition for writ of certiorari, Comstock objects to consideration of any such material by this Court in connection with its deliberations over whether or not to grant the writ.[12]

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[12]Because the Petitioner does not even allude to these materials in the body of his petition, let alone explain their relevance to this case, Comstock has been placed somewhat in the position of shadow-boxing-trying to anticipate possible bases for their reasonable inclusion, and responding thereto. While the better policy might be to ignore these materials completely, since Petitioner did, Comstock is mindful of this Court's injunction in RULE 15.1 that respondents have an obligation to the Court to point out any perceived misstatements of fact or law set forth in the petition which would have a bearing on the question of what issues would properly be before this Court if certiorari were granted.

For example, Petitioner includes, at Pet. App. 259a-276a the articles of incorporation and other corporate documents of Intervenor-Respondent, Comstock. No issue has ever been raised, let alone decided, concerning the *bona fides* of Comstock's corporate status in the State of Nevada, and it is both irrelevant and inappropriate to include such documents in the appendix to the petition.

Second, Petitioner includes the corporate charter of another Nevada corporation, and some newspaper articles pertaining to that corporation. (Pet. App. 276a-290a) Petitioner does not explain for what purpose these materials are included in his appendix. The relevance of the corporate documents is totally lacking as are the newspaper articles, which, in addition, constitute impermissible hearsay,

Petitioner also includes in his Appendix a letter from Comstock's principal Robert Carroll to Comstock's Counsel of Record, which was shared with Petitioner's then communications counsel. This letter, contrary to Petitioner's self-serving introductory statement, is *not* public information, but a confidential letter which was shared with Counsel for the Petitioner in an effort to reach a settlement of the case. Public policy frowns on the use of statements made in the context of settlement discussions,[13] since the law encourages settlements of legal disputes, thus eliminating the need for costly hearings and expenditure of public and private resources. Awareness that statements made in the context of a

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[13] *See* 4 WIGMORE ON EVIDENCE, §§1061, 1062; C.J.S. EVIDENCE, §§285-290; MCCORMICK ON EVIDENCE, 2d Ed. §§74, 274 (West, 1972).

settlement discussion might be later made public would cause self-censorship and hamper sincere efforts by parties to reach compromise. Although the substance of the letter from Comstock's principal to Comstock's counsel is innocuous and immaterial to any issue raised or decided in proceedings below, Comstock objects strongly to its inclusion in the Petitioner's appendix, because it constitutes a breach of the confidence with which it was shared with Petitioner's counsel, *i.e.*, as an offer of compromise to settle the litigation, and Comstock respectfully moves that it be stricken.[14]

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[14]Should this Court decline to strike this portion of Petitioner's Appendix, and, instead, to consider it relevant in disposing of the instant Petition, Comstock would respectfully request that this Court note that the settlement offer conveyed therein was rejected by Schultz, and thereafter withdrawn.

Finally, Petitioner, offers (1) an entry allegedly appearing in BROADCASTING YEARBOOK, 1990, which implies that Comstock is the holder of a construction permit for the FM station in Sparks, Nevada, and (2) a sworn statement by James E. Elliott, dated *circa* May 24, 1991, that Comstock principal Bob Carroll telephoned him sometime in January, 1991 and asked him if he were interested in investing and being part of the management of Comstock's new radio station, that Carroll had obtained a construction permit from the FCC, and hoped to have the proposed station on the air in early 1991. (Pet. App. 293a).

The relevance of this material is not apparent. Petitioner should be aware that orders of the Federal Communications Commission are not automatically stayed by the filing of an appeal with the Unit-

ed States court of appeals. Petitioner never requested a stay, and, accordingly a construction permit was issued to Comstock on September 12, 1990. The permit did state that issuance was "conditioned on the final outcome of the notice of appeal, case number 90-1318, filed June 22, 1990 by Pepper Schultz," and that "any construction undertaken" by Comstock in the interim was "at its own risk."

To summarize, Petitioner has presented no question of law or fact which either requires, or is even appropriate for disposition by this Court. No purpose would served by granting the petition and issuing the writ; the expeditious denial of the petition would avoid further delay in a proceeding that is approaching ten years in duration.

CONCLUSION

For the foregoing reasons, the petition of Pepper Schultz for writ of certiorari should be denied.

Respectfully submitted,

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Comstock Broadcasters, Inc.

September 23, 1991

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OFFICE OF THE CLERK

Nº_____

In The

Supreme Court of the United States

October Term, 1991

PEPPER SCHULTZ,
Petitioner,

vs

FEDERAL COMMUNICATIONS COMMISSION UNITED STATES OF AMERICA, *et al*
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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Zip 89431-0811
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(702) 331-6101 wk

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October Term, 1991

PEPPER SCHULTZ, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pepper Schultz *pro se*, pursuant to Supreme Court Rule 15.6, hereby submits his Petitioner's Reply Memorandum to a Brief In Opposition by Intervenor-Respondent Comstock Broadcasters, Inc. (Comstock).

The Petitioner is with the understanding that the Questions Presented are proper before this Court. That his jurisdiction to be in this Court is pursuant to Statute 1254 (1) and Supreme Court § 13.1 and § 13.4, due to the denial of his petition for rehearing by the United States Court of Appeals, District of Columbia Circuit.

The Petitioner is with the understanding that the case or questions presented to be considered are to be of a constitutional matter pertaining to the good of the citizens of the United States.

The Petitioner is with the understanding that the Writ of Certiorari is not a matter of right, but of judicial discretion in this time of modern systematic review. The Petitioner is aware that this Country is

governed by Rules and not by mankind.

The Petitioner is with the understanding that the Petition of Certiorari is not to be argumentive before the Supreme Court Clerk and that Rule 14.1 (k) [(k)(i) thru (k)(v)], governs the contents of the appendix pertaining to or related to questions presented before the Supreme Court of the United States derived from the case. He is also with the understanding that argument may be presented in the *Brief on Merits*.

The Petitioner is with the understanding that to claim redress in this case, that it cannot be without color of merit. The Petitioner has not lost sight of the construction permit to possibly qualify and, if permitted, will present proper input to the Supreme Court in the *Brief on Merits*.

The Intervenor-Respondent is required to submit error in misstatements of facts in the Petitioner's Writ of Certiorari pursuant to § 15.1. The Petitioner observed a perceived misstatement in Intervenor-Respondent Comstock's Brief in Opposition (Page 16, footnote 8) pursuant to § 15.1. Intervenor-Respondent Comstock has used "over-saturated" market statements presented in the appendix of Petitioner's Writ of Certiorari suggesting that the Reno-Sparks area cannot sustain, economically, the addition of another radio station. These statements, if permitted, will be addressed in the *Brief on Merits*.

In light of the information put forth before the Supreme court by Petitioner and Intervenor-Respondent Comstock, a need for plenary review seems to be necessary and Petitioner suggests that summary reversal is now in order.

Respectfully submitted,

Pepper Schultz

Pepper Schultz, Petitioner
527-10th Street
Sparks, Nevada 89431

September 28, 1991